

JUN 29 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HELEN GJESSING, Individually and as President of Save
Long Bay Coalition, Inc., LEONARD REED, Individually
and as President of Virgin Islands Conservation So-
ciety, Inc., KATE STULL, Individually and as President
of League of Women Voters of V.I., Inc., LUCIEN
MOOLENAAR, Individually and as President of Virgin
Islands 2000, Inc., RUTH MOOLENAAR, Individually and
as Director of St. Thomas Historical Trust, Inc.,

Appellants,

and LEGISLATURE OF THE VIRGIN ISLANDS,

Appellant,

v.

WEST INDIAN COMPANY, LTD.,

Appellee.

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

On Appeal from the United States
Court of Appeals for the Third Circuit

**JURISDICTIONAL STATEMENT OF
APPELLANTS HELEN GJESSING, ET AL.**

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QUESTIONS PRESENTED

1. Did the Repeal Act unconstitutionally impair the Settlement Agreements entered into between the Government of the Virgin Islands and WICO if the Settlement Agreement(s) were invalid?

A. Are the Settlement Agreement(s), conveying trust lands contrary to the Public Trust Doctrine, valid and enforceable?

B. Are the Settlement Agreement(s), divesting the Government of the Virgin Islands of its inherent police powers, valid and enforceable?

C. Are the Settlement Agreement(s), modifying an international treaty entered into by the United States, valid and enforceable?

D. Are the Settlement Agreements, conveying property rights in violation of the common law rule against perpetuities, valid and enforceable?

PARTIES TO THE PROCEEDINGS

The parties to this appeal are listed on the title page in their entirety. Helen Gjessing, *et al.*, and the Legislature of the Virgin Islands are submitting separate jurisdictional statements to better reflect the interests and issues most important to the different parties. A Joint Appendix is used and all appendix references will be to this Joint Appendix.

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**JURISDICTIONAL STATEMENT OF
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Appellants GJESSING, *et al.* appeal to this Court from a decision of the United States Court of Appeals for the Third Circuit holding that an act of the Legislature of the Virgin Islands repealing certain prior acts of the Legislature violated the Contract Clause of the United

States Constitution, Article I, Section 10, as applied to the United States Virgin Islands by Section 3 of the Revised Organic Act of 1954.

OPINIONS BELOW

The opinion and order of the United States District Court of the Virgin Islands holding Act No. 5188 of the Legislature of the Virgin Islands unconstitutional and granting a preliminary injunction is reported at 643 F. Supp. 869 (D.V.I. 1986). (App. 53a). The opinion of the United States Court of Appeals For The Third Circuit affirming the grant of the preliminary injunction is reported at 812 F.2d at 134 (3rd Cir. 1987). (App. 50a). The opinion and judgment of the United States District Court of the Virgin Islands entering a permanent injunction is reported at 658 F. Supp. 619 (D.V.I. 1987) (App. 41a). The opinion of the United States Court of Appeals For The Third Circuit affirming the judgment and grant of a permanent injunction by the District Court was entered on March 31, 1988, is reported at 844 F.2d 1007 (3rd Cir. 1988) and is reproduced in the Appendix at 6a. A certified judgment was issued in lieu of a formal mandate on May 26, 1988. No petition for rehearing or rehearing *en banc* was filed. That opinion of the Court of Appeals is now appealed to this Court for its review.

JURISDICTION

This appeal is brought under 28 U.S.C.A. § 1254(2) from an opinion and judgment rendered by the United States Court of Appeals For The Third Circuit on March 31, 1988.¹ A Notice of Appeal was timely filed in the court of appeals on April 21, 1988.

¹ *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed 2d 174 (1970) is distinguishable from the within appeal in that 28 U.S.C.A. § 1258 provides that this Court has jurisdiction over appeals of final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico. No statute specifically pro-

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal principally involves Article I, Section 10, of the United States Constitution which provides in relevant part that:

No State shall . . . pass any . . . Law impairing the obligation of Contracts . . .

as it applies to the territory of the United States Virgin Islands through Section 3 of the Revised Organic Act of 1954, 48 U.S.C.A. § 1561. (App. 185a).

The following statutes are also involved:

Section 8 of the Revised Organic Act of 1954, 48 U.S.C.A. § 1574 (a); the Territorial Submerged Lands Act of 1963 (Pub. L. 93-435, 77 Stat. 338, 1963), 48 U.S.C.A. § 1701; the Territorial Submerged Lands Act of 1974 (Pub. L. 93-435, 88 Stat. 1212, 1974), 48 U.S.C.A. § 1704; the Special Legislation provisions of 48 U.S.C.A. § 1471; the Virgin Islands Coastal Zone Management Act, 12 V.I.Code Ann. § 901 *et seq.*; and Act Nos. 3326, 4700, and 5188 of the Legislature of Virgin Islands.

All of the above-referenced statutory provisions are set forth in the Appendix. (App. 175a-179a, 185a *et seq.*).

STATEMENT OF THE CASE

1. Facts

This case rests squarely on the issue of the validity of a 1982 Settlement Agreement between the Government of the Virgin Islands, as successor in interest to the

viding for appellate jurisdiction regarding decisions invalidating territorial legislation exists. Therefore, should this Court strictly construe the language of 28 U.S.C.A. § 1254(2) to deny review of the Third Circuit Court's finding that a territorial statute is unconstitutional, Appellants will be denied equal access to the Supreme Court of the United States and will be precluded from exercising their due process right to seek review as a matter of right by the highest Court of the United States.

United States Government, and certain private parties, including the West Indian Company, Ltd., ("WICO") (App. 151a) in which the parties sought to conclude a quiet title action begun by the United States Government in 1968. (App. 85a). This Agreement was preceded by two agreements executed in 1973 and 1974, containing essentially identical terms. (App. 117a and 145a). (Collectively "Settlement Agreements"). The Legislature of the Virgin Islands authorized and ratified the 1973 and the 1982 Agreements in Act Nos. 3326 and 4700, respectively. (App. 176a-179a).

In 1986, the Legislature of the Virgin Islands, over Governor's veto, enacted Act 5188, ("the Repeal Act") which repealed Acts No. 3326 of 1972 and 4700 of 1982. (App. 175a). The two repealed Acts, *inter alia*, purported to ratify contracts purporting to grant WICO a commercial option, exercisable in perpetuity, to dredge and fill portions of the harbor of Charlotte Amalie, St. Thomas, U.S. Virgin Islands. The Acts also provided that WICO would own the resulting filled land in fee simple upon compliance with the conditions of the contract, and that WICO could develop the filled lands without conforming to the strict terms and procedures of the V.I. Coastal Zone Management Act ("CZM Act"), 12 V.I. Code Ann. § 901 *et seq.*, (App. 207a-247a) and most zoning regulations. WICO claimed these "rights" by virtue of a provision in the 1917 Convention of Cession by which Denmark ceded the Danish West Indies to the United States. In that provision, the United States agreed to "maintain . . . in accordance with the terms on which they are given . . . the concession granted to [WICO] . . . relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor." (App. 101a).

The 1972 and 1982 Acts were by-products of a 1968 lawsuit brought by the United States to quiet title to

parcels of land claimed by both WICO and the United States under the 1917 treaty between Denmark and the United States. The United States also sought to declare terminated any license WICO may have had pursuant to the treaty to dredge and fill in the St. Thomas Harbor. (App. 85a-89a).

Notwithstanding the fact that the Government of the Virgin Islands was never joined as a party to the legal action, WICO, unsure of its legal position regarding the United States' challenges, made a settlement proposal to the Virgin Islands to alter the terms of the treaty. As a result of certain coercive acts by the trial judge and WICO (App. 90a-92a, 120a), the Virgin Islands Legislature enacted Act No. 3326, approved October 30, 1972, authorizing settlement of the claims on the terms set forth in a Memorandum of Understanding submitted by WICO. (App. 178a). A year later, on October 3, 1973, a formal Memorandum of Understanding was entered into among the United States Department of Interior, the Government of the Virgin Islands, WICO, and others. The Department of Interior, however, never executed the Agreement. (App. 142a). Because certain crucial issues were involved that were not necessarily within the direct scope of the lawsuit, the Justice Department included in the Memorandum of Understanding a provision that any conveyance had to be made pursuant to the then extant Territorial Submerged Lands Act of 1963, 48 U.S.C.A. § 1701 *et seq.* (App. 121a-122a). In 1974 Congress amended the Submerged Lands Act, 48 U.S.C.A. § 1705(a), conveying, subject to valid existing rights, title to all submerged lands to the Government of the Virgin Islands "to be administered in trust for the benefit of the people thereof." (App. 193a).

Thereupon, WICO immediately prepared a First Addendum to the Memorandum of Understanding essentially substituting the Government of the Virgin Islands for the Department of Interior and maintaining a conveyance

procedure based on the provisions of the amended Territorial Submerged Lands Act. This First Addendum was executed on October 28, 1975. (App. 145a).

In 1977, the Virgin Islands Legislature enacted the CZM Act, 12 V.I.C. Ann. § 901 *et seq.* to provide for the proper management of the coastal areas and to carry out its newly acquired trust responsibilities over the submerged lands of the Virgin Islands. (App. 207a).

WICO interpreted the CZM Act to preclude private ownership of submerged and filled lands and to restrictively control development within the coastal zone. WICO, therefore, immediately protested the applicability of the CZM Act to it and asserted that application of the CZM Act to WICO would constitute a breach of the Settlement Agreements. WICO submitted a draft complaint to the Government of the Virgin Islands, threatening to sue for breach of contract for five million dollars in damages. (App. 198a-201a). Thereafter, WICO submitted a proposal to the Virgin Islands Government to amend the CZM Act to exempt the area WICO claimed from the regulations imposed by the legislation.

In 1982, without any consideration of its obligation as trustee of submerged lands, the Virgin Islands Legislature, by Act No. 4700, ratified a Second Addendum to the October 3, 1973 Memorandum of Understanding. Act No. 4700 exempted WICO from provisions of the CZM Act regulating its dredge and fill activities and purported to ratify a contract that purported to create a contingent future interest in fee simple absolute which would vest, if ever, only upon WICO's exercise of a perpetual option.

The original 1968 lawsuit remained pending pursuant to a *sine die* Order until 1984 (App. 93a), when the trial judge in the instant case dismissed the action along with a number of old cases, *sua sponte*, as a ministerial matter.

In June 1986, after obtaining CZM and Army Corps of Engineer permits without following standard statutory

procedures, WICO commenced dredging in the harbor of Charlotte Amalie. This produced a public outcry, which resulted in the calling of a Special Session of the Virgin Islands Legislature on July 9, 1986 and the passage of Bill No. 16-0607, repealing Acts No. 3326 and 4700, and thereby the ratifications and approval of the Settlement Agreements. Although the then Governor vetoed the Repeal Act, on August 11, 1986, the Legislature overrode the veto and the Repeal Act became law as Act No. 5188. (App. 175a).

Pursuant to the Repeal Act, the Virgin Islands Department of Conservation and Cultural Affairs issued a stop work order against WICO's continued dredging. (App. 205a).

2. Proceedings Below

Upon being served with the stop work order, WICO promptly brought suit in the United States District Court of the Virgin Islands for immediate and permanent injunctive relief against the Government of the Virgin Islands. At the hearing on WICO's Motion for a Temporary Restraining Order, the Attorney General specially appeared and was allowed to withdraw on the grounds that his office represented the Executive Branch which had vetoed the legislation and which did not intend to defend the action. WICO's motion was then granted.

Motions to intervene were subsequently filed by the present appellants (hereinafter "Citizens") and the Legislature of the Virgin Islands which were granted by the Court. The Citizens argued, *inter alia*, that WICO had no vested property rights as any interest which it obtained had always been subject both to the public trust doctrine and to the Virgin Islands Government's exercise of its police power.

A Memorandum Opinion and Order granting WICO's motion for a preliminary injunction was entered on September 3, 1986. (App. 53a). The trial court held, first,

that the conveyance of trust lands was proper, and second, that the conveyance was not an impermissible abridgement of the government's police powers. The Citizens and the Legislature appealed this opinion and order to the United States Court of Appeals for the Third Circuit.

In their brief and argument to the Court of Appeals, the Citizens renewed the arguments based on the public trust doctrine and the continuing power of the Virgin Islands Government to exercise its police power. They also asserted that the conveyance was void as fatally violative of the Rule Against Perpetuities. The Court of Appeals, *per curiam*, on February 26, 1987, affirmed the District Court Order granting the preliminary injunction. (App. 50a).

On April 13, 1987, after receiving cross motions for summary judgment, the District Court granted judgment to WICO and entered a permanent injunction. In so doing, the Court adopted the rationale of its previous opinion and, with respect to the argument regarding the Rule against Perpetuities, held that Acts 3326 and 4700 were local laws which modified the Rule and therefore rendered it inapplicable.

Timely appeals of the District Court's order were filed with the United States Court of Appeals for the Third Circuit by the Citizens and the Legislature. At oral argument (App. 94a-97a), the Citizens, in addition to the arguments asserted previously, raised the point that Acts 3326 and 4700 were void as being *ultra vires* acts. It was argued that the Acts attempted to impair rights existing by virtue of a treaty entered into by the United States, and therefore violated section 8(a) of the Revised Organic Act of 1954, 48 U.S.C.A. § 1574(a). (App. 187a).

The Court of Appeals affirmed the decision of the District Court on March 31, 1988. (App. 6a). On April 21, 1988, the Citizens filed a timely Notice of Appeal

from this decision to the Supreme Court of the United States. (App. 1a). Related to this appeal is an appeal by the Legislature of the Virgin Islands from the United States Court of Appeals for the Third Circuit, App. No. 87-3369. Timely Notice of Appeal was filed by the Legislature with the Court of Appeals on June 13, 1988. (App. 4a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court of Appeals' finding that a valid contract was entered into between the Government of the Virgin Islands and the West Indian Company, Ltd. (WICO) is based on the erroneous application of Supreme Court decisions and statutory provisions to the facts of this case. The Court of Appeals' finding ratifies the extinguishment of traditional uses of the shoreline at Long Bay which are protected by a public trust and sanctions further destruction of the natural shoreline of the Harbor for as yet undisclosed uses by WICO. To prohibit the Virgin Islands Legislature from exercising its fiduciary duty to protect the submerged lands entrusted to it by repealing invalid acts of prior legislatures, strips the Legislature of its sovereign power to regulate the coastal zone in the interest of the citizens of the Territory and denies the people of the Virgin Islands the protection of the exercise of the police powers of the Legislature.

In addition, the 1982 Second Addendum and its predecessor agreements were invalid in that they altered the terms of the 1917 Treaty of Cession between the United States and Denmark in violation of Section 8 of the Organic Act of the Virgin Islands. Finally, the Settlement Agreements violated the Rule Against Perpetuities and therefore were void *ab initio*.

The potential impact of the decision rendered by the Court of Appeals reaches far beyond the facts of this case. The very status of the Virgin Islands Legislature *vis-a-vis* state legislative bodies has been thrown into question. Certainly, the powers of the territorial legislature, in matters relating to lands specifically placed under

its sovereign jurisdiction in trust for the people of the territory must include the power to subject all such lands to regulations designed to preserve and protect those traditional and beneficial uses for which the public trust doctrine was created. Such power cannot be contracted away, and the attempt by the Virgin Islands Government to do so was invalid. Hence, the question presented touches not only the technical and substantive invalidity of the agreements at issue, it goes directly to the integrity of Virgin Islands legislative enactments and the ability of the citizens to ensure that their inalienable rights cannot be irrevocably squandered by the imprudent action of a government of the day.

I. Established Principles of Public Trust Doctrine Compel a Finding that Attempts to Convey Submerged Lands for Undisclosed Development Purposes Are Invalid.

The submerged lands constituting St. Thomas Harbor are held by the Virgin Islands Government in trust for the people of the Territory, the government, having obtained title from the previous trustee, the Government of the United States.² Hence, in addition to the bare legal title to the property (the *jus privatum*), the public holds an equitable interest (the *jus publicum*) which may be extinguished only in highly exceptional circumstances. *Shively v. Bowlby*, 152 U.S. 1 (1894).

The conditions which must be met prior to any conveyance of property subject to the public trust restrictions have been clearly set forth in *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1893). In that case, the Court set forth the following test:

[t]he trust with which they are held, therefore, is governmental and cannot be alienated, except in

² Pursuant to the 1974 Territorial Submerged Lands Act, 48 U.S.C.A. §§ 1704-1708 (1982 & 1987 Supp.) the United States transferred title to the submerged lands in question to the Virgin Islands government "to be administered in trust for the benefit of the people thereof." 48 U.S.C.A. § 1705(a). (App. 193a)

those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and water remaining.

142 U.S. at 455-56.

Further analysis of the *Illinois Central* case reveals that both parts of the test must be met. Therefore, any agreement to convey property subject to the public trust must comply in substance with the strictures of the trust requirements or be declared invalid.

The lands in question are part of the floor of St. Thomas' principal port and, as such, part of the submerged lands conveyed by the United States to the Virgin Islands government. This fact was acknowledged by WICO when it agreed to follow the conveyancing procedure established in the Submerged Lands Acts of 1963 and 1974. (App. 122a and 145a).

The Court of Appeals findings that the alienation of the property in this case was prudent, in the public interest, and in keeping with the prior decisions of this Court constitutes a clear misapplication of precedent (App. 33a-35a). The focus in a public trust analysis must be a case specific determination of the public uses and interest potentially impacted by conveyance of the trust lands in light of the requirements of *Illinois Central*. The within case presents the Court with an opportunity to reinforce this analysis. The focus, by the Court of Appeals, on the fact that other submerged lands have been conveyed out of trust and that such conveyances have been upheld, does nothing to aid the inquiry necessary in the St. Thomas case.

The Virgin Islands Legislature breached the public trust when it amended Title 12, Virgin Islands Code, Chapter 21, pertaining to coastal zone management by Act No. 4700, approved April 7, 1982. (App. 176a). The amendment did not meet either of the criteria set forth in *Illinois Central*: (1) no finding was or could be

made by the Legislature that the proposed development would improve the public's interest in the *jus publicum* as the developer's plans have not been disclosed; and (2) in view of this unwillingness to disclose development intentions it was not determinable if the purported extinguishment of the *jus publicum* could be achieved without substantial impairment of the public's interest in the remaining trust lands and waters. The proposed uses of the reclaimed lands surmised by the Court (App. 34a) do not address the traditional public uses of the property and the cultural and aesthetic importance of preserving the remaining shoreline of St. Thomas Harbor. Appellants believe that without the analysis required by *Illinois Central* all of the Settlement Agreements must fail.

In its most recent statement on the public trust doctrine, this Court gave the trustee-state great deference in determining what constituted protected public trust interests. *Phillips Petroleum Co. v. Mississippi*, — U.S. —, 108 S.Ct. 791 (1988). The Court noted that uses well beyond navigation constitute valid public trust purposes. 108 S.Ct. at 798. Of particular application here, the Court stated “[t]he fact that petitioners have long been record title holders, or long paid taxes on these lands does not change the outcome.” 108 S.Ct. at 799. Just as the claim of Mississippi to the tidewater lands was upheld, so too, should the Virgin Islands Legislature be given deference when it specifically considered the public trust doctrine to determine and establish its “own views of justice and policy” concerning public trust lands in the territory. 108 S.Ct. at 799.

II. By Expressly Exempting WICO From the Operation of the CZM Act, the 1982 Agreement is Void as an Unlawful Attempt to Contract Away the Future Exercise of the Police Power.

The 1982 Second Addendum expressly exempts WICO from the provisions of the 1978 Virgin Islands CZM Act set forth in Title 12 V.I.C. Ann. Chapter 21. (App. 164a).

The CZM Act has been held to be a constitutionally valid exercise of the Virgin Islands Government's police power. *Great Cruz Bay Dev. Co. v. V.I. Board of Land Use Appeals*, 18 V.I. 536, 541 (D.C.V.I. 1981).

The well-established legal principle that the government's future exercise of its police powers cannot be contracted away was virtually ignored by the Court of Appeals and the District Court. In the seminal case of *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977), this Court noted the governing principle at page 23:

As early as *Fletcher v. Peck*, the Court considered the argument that 'one legislature cannot abridge the powers of a succeeding legislature'. 6 Cranch at 135. It is often stated that 'the legislature cannot bargain away the police power of a state'. *Stone v. Mississippi*, 101 U.S. 814, 817, 25 L.Ed. 1079 (1880) . . . In short, the contract clause does not require a state to adhere to a contract that surrenders an essential attribute of sovereignty.

431 U.S. at 23.

The application of this controlling principle to the 1982 Second Addendum voids the purported contract as an attempt to bind future Virgin Islands Legislatures from exercising their power to legislate for the public's interest.

The application is particularly compelling in view of the significance of the resources at issue and the highly regulated subject area to which the police powers apply in the instant action. WICO's dredging, filling, and development activities in St. Thomas Harbor are clearly within the coastal zone to which the Virgin Islands Legislature sought to give special protection in passing the CZM Act in 1978. Title 12 V.I. Code Ann. Chapter 21. (App. 207a). In particular, the Legislature recognized a pressing need to protect, conserve and, where possible, enhance resources found in the coastal zone for the benefit of the people of the Virgin Islands. Title 12 V.I.C. Ann. § 903. (App. 212a). This policy is consistent

with the national policy for the costal areas of the United States. Title 16 U.S.C.A. § 1451 *et seq.* To exempt WICO from the CZM Act and, thus, the continuing exercise of the Legislature's power to regulate development in one of the most important and fragile resources of the Territory, the coastal zone, is clearly contrary to the interests of the people of the Virgin Islands and an egregious breach of the powers of future Legislatures.

The breach is even more serious when considered in light of the prohibitions of the Rule Against Perpetuities, discussed below.

The Second Addendum is an invalid and unenforceable contract which expressly precludes the Virgin Islands Legislature from exercising its police power. The repeal of Act 4700, the legislative enactment ratifying the 1982 Second Addendum, was a valid renunciation by the 16th Legislature of an unenforceable contract.

III. The Settlement Agreements Entered Into Between WICO and the Virgin Islands Government Undeniably Constituted a Modification of the 1917 Treaty Between the United States and Denmark in Violation of Law; Accordingly, No Violation of the Contract Clause Occurred When the Legislature Enacted Act No. 5188 Repealing the Invalid Settlement Agreements.

Conspicuously absent from the Court of Appeals' conclusion that the 1982 Agreement was a binding contract and that the Repeal Act was a violation of the contract clause, as applied to the Virgin Islands, is any analysis of the validity of the Settlements Agreements in light of the prohibition set forth in Section 8(a) of the Revised Organic Act of 1954, 48 U.S.C.A. § 1574(a). (App. 187a). This provision unequivocally prohibits the Legislature of the Virgin Islands from enacting any law which would impair or alter any rights existing or arising by virtue of any treaty or international agreement entered into by the United States.

The 1973 Memorandum of Understanding plainly makes reference to the rights claimed by WICO under the 1917 Treaty and the desire of the parties to adjust those rights. (App. 117a, 119a, 122a). At no time did the United States or Denmark sign the 1973 or 1982 agreements. (App. 142a and 173a). In fact, the 1982 addendum was entered into solely between the Virgin Islands Government and the private parties. When the Legislature enacted Act No. 4700 in 1982 it was seeking to ratify the 1982 agreement.

From the scenario of events surrounding the making, approving, and executing of the various agreements, it is obvious that the Virgin Islands Legislature engaged in *ultra vires* activities by entering into settlement agreements and enacting laws which purported to modify and impair the terms of an international treaty of which the United States was a contracting party. Notably, neither Denmark nor the United States³ consented to any modification of the treaty as required by Sections 155 and 156 of Restatement (Second) Foreign Relations Law of the United States (1965).⁴ (App. 251a). Comment (c) to § 156 states:

Consent of all parties essential. The consent must be the consent of all parties if the agreement is to be validly modified, suspended or terminated with respect to all parties.

Id.

The Virgin Islands Legislature lacked any authority to enact laws or enter into agreements to alter or impair any international treaty where the United States was

³ Because the 1917 Convention of Cession constituted an international agreement, modification could only be accomplished by the joint action of the President and the Senate, Restatement (Second) Foreign Relations Law of the United States (1965) § 163(2), which was not done. (App. 253a).

⁴ In the absence of local laws to the contrary, American Law Institute restatements of the law apply as rules of decision for Virgin Islands Courts. Title 1 V.I. Code § 4. (App. 249a).

a contracting party. Further, the Settlement Agreements, modifying the international treaty failed to reflect the consent of all the parties to the Concession. Therefore the Repeal Act cancelling the Virgin Islands Governments' execution of the Settlement Agreements, could not have been in violation of the Contract Clause of the United States Constitution. If the agreements were not valid there could be no violation of contract rights.

IV. Valid Contract Rights Protected Under the Contract Clause Never Existed as the Application of the Rule Against Perpetuities to the Terms of the Agreements in Question Renders Such Agreements as Void *Ab Initio*, Especially in Such Circumstances Where the Public Trust Doctrine is Applicable.

The Second Addendum and its predecessor contracts all violate the Rule Against Perpetuities ("the Rule") and, therefore, are void *ab initio*. Restatement of Property (1944) §§ 370, 374, 393, applicable under Title I V.I. Code Ann. Section 4. (App. 250a and 249a). When a contingent interest in land is created, such contingent interest must be certain to vest or fail within twenty-one (21) years of its creation when viewed from the date of such creation. *Id.* The future interests purportedly created in WICO are springing executory interests that cannot vest in interest until they vest in possession, Leach, "Perpetuities in a Nutshell," 51 *Harvard Law Review* 638, 648 (1938) and are interests in land subject to the Rule. *Certified Corp. v. GTE Products Corporation*, 392 Mass. 821, 467 N.E.2d 1336 (Mass. 1984).

Though the assertions raised by the Citizens as applied to the Settlement Agreements (App. 28a), were conspicuously ignored by the Court of Appeals, it is imperative that courts of the United States apply the Rule where it is not altered, amended or terminated by law.

It is a well-established principle of statutory construction established by this Court that "the common law . . .

ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Housing Authority v. C. & P. Telephone*, 464 U.S. 30, 36 (1983). Contrary to the holding of the District Court (App. 46a), no provision of Act No. 4700 expressly or impliedly refers to a modification or repeal of the common law Rule Against Perpetuities or utilizes the common phrase, "notwithstanding other provisions of law".

To construe the statute as exempting WICO from the generally applicable Rule Against Perpetuities would have constituted "special legislation" prohibited by Title 48 U.S.C.A. § 1471 in effect at the time of enactment of Act No. 4700.⁵ (App. 248a). In fact, the same assertion may be made about the attempt of Act No. 4700 to exempt WICO from the CZM Act. To read the ratification language of "with the full force and effect of law," as repealing the application of the Rule is contrary to the well-established principle cited above. The common law rule is, therefore, fully applicable to the agreements in question.

Section 6(e) of the Second Addendum contains this provision: "The right on WICO's part to reclaim Areas IV, A-2 and VII-A is a right on WICO's part to perform the reclaiming and does not impose an obligation on WICO's part to be performed." (App. 157a). This provision purports to create a commercial option, exercisable in perpetuity, which causes WICO's future interests to be void *ab initio*. Restatement of Property (1944) § 393 (App. 250a); *United Virginia Bank v. Union Oil Co. of California*, 214 Va. 48, 197 S.E.2d 174 (Va. 1973); *Buffalo Seminary v. McCarthy*, 86 A.D.2d 435, 451 N.Y.S. 2d 457 (N.Y. App. Div. 1980), *aff'd*, 58 N.Y.2d 867, 447 N.E.2d 76 (N.Y. 1983); *Certified Corp v. GTE Products*

⁵ Title 48 U.S.C.A. § 1471 was subsequently repealed by Public Law 98-0312, § 16(w) to (ee) on December 8, 1983.

Corporation, 392 Mass. 821, 467 N.E.2d 1336 (Mass. 1984). The condition precedent to the vesting of WICO's future interest is WICO's outstanding decision to exercise the option, a decision that was not certain to occur, if at all, within 21 years of the date of the contract. The invalidity of WICO's future interests causes the entire settlement agreement to be unenforceable. Restatement of Property (1944) § 402(c). (App. 251a).

The appellate court's statement that "[t]he Second Addendum contains time limits within which WICO bound itself to act" (App. 26a-27a) is in error if the court assumed that these time limits assured that WICO's interests would be certain to vest or fail within 21 years. The Settlement Agreements do not contain a perpetuities savings clause, and all the time limits begin running from events that are not certain to occur, if at all, within 21 years.

The Rule Against Perpetuities should be applied especially in testing the validity of contracts that purport to extinguish the public's beneficial interests protected by the public trust doctrine. The sovereign, as trustee, cannot extinguish the *jus publicum* unless particular requirements have been met. See: *Illinois Central Railway Co. v. Illinois*, *supra* 146 U.S. at 452-53. If the sovereign purports to license extinguishment of the *jus publicum* on a remote contingency—one that is not certain to occur, if ever, within 21 years—there is no way that the sovereign can be certain at the outset of such an attempt that the *Illinois Central* criteria have been met, or will ever be met. The provisions of the Settlement Agreements that purport to license a remote extinguishment of the *jus publicum*, therefore, violate the public trust doctrine. By purporting to exempt the remotely vesting interests from applicable comprehensive laws, these provisions also constitute an egregious effort to contract away, in perpetuity, the future exercise of the police power.

The Settlement Agreements would "put it in the power of the company [WICO] *to delay indefinitely* the improvement of the harbor. . . ." (emphasis added) *Illinois Central* at 451. The Supreme Court, in *Illinois Central*, would not uphold such a perpetual power; appellants respectfully argue that WICO's purported perpetual power is similarly invalid.

These principles apply equally to the Virgin Islands Government's action and to the prior attempts of the U.S. Government, as both acted as trustees of the submerged lands in question and parties to the Agreements. *Martin v. Waddell*, 41 U.S. 367 (1842); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894); Act of November 20, 1963, Pub.L. 88-183, 1963, U.S. Code Cong. & Ad. News (77 Stat.) 366 (App. 188a); and 48 U.S.C. § 1705(a) (Supp. 1988), Pub.L. 93-435, 93d Cong., 2d Sess.

CONCLUSION

It follows from the arguments set forth above that a substantial question exists whether a valid contract existed under established Supreme Court precedent and applicable constitutional and statutory provisions. If the 1982 Settlement Agreement was an invalid contract the Repeal Act could not constitute a violation of the Contract Clause of the United States Constitution as applied to the United States Virgin Islands and the holding of the Court of Appeals must be reversed. Appellants pray this Court to accept this case for appellate review.

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DATED: June 29, 1988



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Nos. —

Supreme Court, U.S.

FILED

JUN 29 1988

JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

LEGISLATURE OF THE VIRGIN ISLANDS,
Appellant,
and

HELEN GJESSING, Individually and as President of Save
Long Bay Coalition, Inc., LEONARD REED, Individually
and as President of Virgin Islands Conservation
Society, Inc., KATE STULL, Individually and as Presi-
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MOOLENAAR, Individually and as President of Virgin
Islands 2000, Inc., RUTH MOOLENAAR, Individually and
as Director of St. Thomas Historical Trust, Inc.,
Appellants,

v.

WEST INDIAN COMPANY, LTD.,
Appellee,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee.

On Appeal from the United States Court of Appeals
for the Third Circuit

JOINT APPENDIX TO JURISDICTIONAL STATEMENT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3369, 87-3370, 87-3371, 87-3372

THE WEST INDIAN COMPANY, LTD.,
Appellee

vs.

GOVERNMENT OF THE VIRGIN ISLANDS, LEGISLATURE OF
THE VIRGIN ISLANDS (Intervenor), HELEN GJESSING
(Intervenor), LEONARD REED (Intervenor), KATE
STULL (Intervenor), LUCIEN MOOLENAAR (Intervenor),
RUTH MOOLENAAR (Intervenor),

Appellants

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that HELEN W. GJESSING, Individually and as President of the Save Long Bay Coalition, Inc., KATE STULL, Individually and as President of the League of Women Voters, Inc.; RUTH MOOLENAAR, Individually and as Director of the St. Thomas Historical Trust, Inc., LEONARD REED, Individually and as President of the Virgin Islands Conservation Society, Inc., and LUCIEN MOOLENAAR, Individually and as President of the Virgin Islands 2000, Inc., appellants in this case, hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Third Circuit dated March 31, 1988, affirming the judgment of the United States District Court for the District of the Virgin Islands dated April 13, 1987.

This appeal is taken pursuant to Title 28 U.S.C. § 1254 (2).

Dated: April 20, 1988

Attorneys for Appellants

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/s/ Brenda J. Hollar
BRENDA J. HOLLAR, ESQ.

/s/ Judith L. Bourne
JUDITH L. BOURNE, ESQ.

AFFIDAVIT OF SERVICE

I, LORECIA N. KRIGGER, being duly sworn do hereby depose and say that on this 20th day of April, 1988, I caused a true and exact copy of the foregoing Notice of Appeal to be served, by hand delivery, on Maria T. Hodge, Esq. for West Indian Company, Ltd., 40B Beltjen Road, St. Thomas, USVI 00802; Godfrey deCastro, Attorney General of the V.I., for the Executive Branch of the Government of the U.S. Virgin Islands, at Department of Justice, Post Office Square, St. Thomas, USVI 00802; and on Rhys S. Hodge, Esq. for the Legislative Branch of the Government of the U.S. Virgin Islands, at #19 Norre Gade, St. Thomas, USVI 00802.

/s/ Lorecia N. Krigger
LORECIA N. KRIGGER

SWORN AND SUBSCRIBED TO BEFORE ME THIS
20th DAY OF APRIL, 1988.

/s/ David A. Bornn
Notary Public

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3369, 87-3370, 87-3371, 87-3372

THE WEST INDIAN COMPANY, LTD.,

v.

Appellee

GOVERNMENT OF THE VIRGIN ISLANDS, LEGISLATURE OF
THE VIRGIN ISLANDS (Intervenor), HELEN GJESSING
(Intervenor), LEONARD REED (Intervenor), KATE
STULL (Intervenor), LUCIEN MOOLENAAR (Intervenor),
RUTH MOOLENAAR (Intervenor),

Appellants

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Appellant Legislature of the Virgin Islands in this case, hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Third Circuit dated March 31, 1988, affirming the judgment of the United States District Court for the District of the Virgin Islands dated April 13, 1987.

This appeal is taken pursuant to Title 28 U.S.C. § 1254 (2).

Dated: June 13, 1988

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BURKE, BOSSELMAN & WEAVER

By /s/ Fred P. Bosselman
FRED P. BOSSELMAN, ESQ. .

AFFIDAVIT OF SERVICE

I, Fred P. Bosselman, being duly sworn do hereby depose and say that on this 13th day of June, 1988, I caused a true and exact copy of the foregoing Notice of Appeal to be served by hand delivery on Maria T. Hodge, Esq. for West Indian Company, Ltd., 40B Beltjen Road, St. Thomas, USVI 00802; Godfrey deCastro, Attorney General of the V.I., for the Executive Branch of the Government of the U.S. Virgin Islands, at Department of Justice, Post Office Square, St. Thomas USVI 00802; and on David Bornn, Esq. at No. 8 Norre Gade, St. Thomas, V.I. 00802, Judith Bourne, Esq. at 14B Norre Gade, St. Thomas, USVI 00802 and Brenda Hollar, Esq. at 2A&2B Kongens Gade, St. Thomas, USVI 00802.

/s/ Fred P. Bosselman

SUBSCRIBED AND SWORN to before me this 12th day of June, 1988.

/s/ William J. Turberville II
Notary Public
Commission Expires: Oct. 2, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3369, 87-3370, 87-3371, 87-3372

THE WEST INDIAN COMPANY, LTD.

vs.

GOVERNMENT OF THE VIRGIN ISLANDS

- (1) LEGISLATURE OF THE VIRGIN ISLANDS (Intervenor)
- (2) HELEN GJESSING (Intervenor)
- (3) LEONARD REED (Intervenor)
- (4) KATE STULL (Intervenor)
- (5) LUCIEN MOOLENAAR (Intervenor)
- (6) RUTH MOOLENAAR (Intervenor)

LEGISLATURE OF THE VIRGIN ISLANDS,
intervenor above named,
Appellant in No. 87-3369

HELEN W. GJESSING, Individually and as President
of the Save Long Bay Coalition, Inc.,
Appellant in No. 87-3370

KATE STULL, Individually and as President of the
League of Women Voters, Inc.; and

RUTH MOOLENAAR, Individually and as Director of the
St. Thomas Historic Trust, Inc.,
Appellants in No. 87-3371

LEONARD REED, Individually and as President of the
Virgin Islands Conservation Society, Inc., and
LUCIEN MOOLENAAR, Individually and as President of
the Virgin Islands 2000, Inc.,
Appellants in No. 87-3372

On Appeal from the District Court
of the Virgin Islands (St. Thomas)
(D.C. Civil No. 86-293)

Argued December 7, 1987

BEFORE: GIBBONS, *Chief Judge*,
STAPLETON, and MANSMANN, *Circuit Judges*
(Opinion filed March 31, 1988)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

The intervenors in this action, including the present Virgin Islands legislature and the officers of various interested citizen groups, appeal from a summary judgment in favor of, and grant of a permanent injunction to, the West Indian Co., Ltd. (WICO). The central issue presented is whether a 1982 agreement between WICO and the Government of the Virgin Islands, ratified by the legislature then sitting, should be considered contractually binding on the present legislature. The district court held that it should; the intervenors contend that it should not. Because we agree with the district court's conclusions that the 1982 agreement is a contract and that the present legislature's attempt to cancel it by means of the Repeal Act is a violation of the contract clause of the United States Constitution, incorporated into Virgin Islands law by § 3 of the Revised Organic Act, we will affirm.

I.

WICO is a Dutch-owned Virgin Islands corporation. In 1913, Denmark, then the sovereign of the Virgin Islands, granted WICO, then a Dutch entity, rights in certain parts of the Long Bay area of the St. Thomas

harbor on Charlotte Amalie. This grant was evidenced by two letters to WICO from the Danish Ministry of Finance, dated January 18, 1913 and April 16, 1913.¹ Of these letters, the first was the more significant; it provided that when designated submerged areas of the harbor had been reclaimed by WICO, the company would acquire free and unrestricted ownership of the land. No time limitations restricted WICO's reclamation rights under this original grant.

In 1914, WICO built a dock and harbor basin in the area covered by the grant, leaving it with reclamation rights in 42 additional acres. Although it did business in the Virgin Islands continuously over the years, using its dock and harbor basin, WICO did not proceed with any further reclamation until 1986.

In 1917, Denmark ceded the Virgin Islands to the United States. WICO's rights were specifically preserved by § 3 of the Convention of Cession, which read:

4) The United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:

a. The concession granted to 'Det vestindiske Kompagni' (the West Indian Company) Ltd. by the communications from the Ministry of Finance of January 18th 1913 and of April 16th 1913 relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor.

¹ The Danish Government had originally granted a similar concession to a consortium of Dutch businessmen. The consortium proved unable to meet the conditions of its concession, however, and its rights were transferred by the Danish Government to WICO in the 1913 grant, with certain modifications.

App. at 30, 32. Before signing the Convention, the United States asked Denmark whether the grant to WICO was in perpetuity; Denmark responded that it was, and that there was no limitation as to the time within which WICO had to exercise its rights.²

No further developments of significance took place until 1968, when the United States Department of the Interior filed suit in federal district court in the Virgin Islands, seeking to quiet title to the area of WICO's Danish grant and secure a declaratory judgment that WICO's treaty rights had lapsed. WICO defended this action, arguing that its treaty rights to reclaim and take title were vested and in perpetuity. While this suit was pending, the Danish Government sent a formal diplomatic note, dated June 25, 1970, to the United States Government, stating that WICO's treaty rights had originally been granted by Denmark without condition as to time and requesting that those rights be respected.

WICO proposed a settlement of the suit to both the Government, although the latter was not formally a party, and negotiations began. The parties to the negotiations included the United States Government, the Virgin Islands Government, WICO, and other private parties with interests in the harbor. The negotiations were successfully concluded in 1972 with a settlement agreement, the substance of which was that WICO would surrender reclamation rights to 12 out of the 42 acres at issue and the United States and Virgin Islands Governments would recognize WICO's right to reclaim and obtain title to the remaining 30 acres. A number of other obligations were also assumed by WICO as conditions of the settlement; for example, WICO agreed to

² The Danish Government also informed the United States at this time that because WICO had begun to exercise its rights by doing some reclamation, WICO's rights had vested under Danish law.

fill in an extra 2.5 acres for public parkland and transfer it to the Virgin Islands Government, and to fill certain waterfront land so as to enable the Government to widen the shoreline highway from two to four lanes. The conditions of the settlement agreement were embodied in a document called the Memorandum of Understanding. The parties included in the Memorandum a statement of reasons why they believed the conveyance to WICO would further the public interest, including not only the above benefits but also the expected increase in employment, improvement of facilities for tourism, and elimination of the "possible cloud over the future of St. Thomas Harbor" posed by WICO's Danish rights.

Because at that time the United States held title to the submerged lands surrounding the Virgin Islands, the parties to the settlement considered it necessary to arrange a two-step procedure for transferring title to the 30 acres to WICO after reclamation: the United States Government would convey to the Virgin Islands Government, and the Virgin Islands Government to WICO. The Memorandum was not particularly clear, however, on just when the transfer of title was to be accomplished. It provided that after specified conditions had been met, the parties would meet at a Closing to exchange various documents; after the Closing, further conditions would have to be met, mainly the completion of reclamation within specified time limits, before WICO would actually receive title. "Once reclaimed," § 15(b) of the Memorandum states, "the areas filled shall belong to WICO in fee simple . . . provided that WICO is then in compliance with Sections 2 and 8 of this Agreement requiring WICO to fill and provide land for the V.I. Government." Section 15(b) of the Memorandum also contains the following provision:

Except as otherwise specifically provided herein, this Agreement shall be binding upon and shall inure to

the benefit of the parties, their successors and assigns.

When the settlement had been reached, public hearings were held. The agreement then went to the Virgin Islands legislature, the Ninth Legislature, for ratification, which was forthcoming in the form of Act No. 3326, passed on October 11, 1972 and formally approved by the Governor on October 30, 1972. Because the Virgin Islands Government was not a party to the underlying suit, its ratification of the settlement took the form of a recommendation to the United States Government to accept and implement the settlement. There is no evidence that the Ninth Legislature acted hastily or without full information and adequate opportunity for public comment in approving the settlement agreement.³

The Memorandum of Understanding was signed on October 3, 1973 by the United States Government, the Virgin Islands Government, WICO, and the other interested private parties. The Memorandum was filed with the district court, and the Department of the Interior's action was stayed sine die pending completion of the various prerequisites to closing and ultimate transfer of title specified in the Memorandum.

³ In fact, the opposite appears true. One of the intervenors, discussing the passage of Acts No. 3326 and 4700, asserts that:

If any records were preserved, it [sic] would readily reflect that the League of Women Voters of the Virgin Islands and the Virgin Islands Conservation Society have always made appearances and have voiced strong objection to any dredging in St. Thomas Harbor Despite the vocal opposition to the dredging . . . prior legislation was nevertheless enacted

Gjessing Br. at 23-24. Others of the intervenors state that from the time of the proposed settlement agreement on, "vigorous public opposition has been voiced by individuals and citizens groups." Moolenaar/Reed Br. at 10.

The preconditions set by the Memorandum to transfer of title were never fulfilled; the order of events envisioned by the drafters of the Memorandum was altered in several respects. First, in October 5, 1974, the United States passed the 1974 Territorial Submerged Lands Act, 48 U.S.C. §§ 1701-1708 (1982 & 1987 Supp.). Under this law,

[s]ubject to valid existing rights, all right, title, and interest of the United States in lands permanently or periodically covered by tidal waters . . . and in artificially made, filled in, or reclaimed lands which were formerly permanently or periodically covered by tidal waters, are hereby conveyed to the governments of Guam, the Virgin Islands, and American Samoa, as the case may be, to be administered in trust for the benefit of the people thereof.

48 U.S.C. § 1705(a). To accommodate this change in circumstances, WICO drafted and presented to the Virgin Islands Government a First Addendum to the Memorandum, dated October 28, 1975. This Addendum simply eliminated the first of the two steps of the title transfer procedure. The executive branch of the Virgin Islands Government agreed to this change, and the Virgin Islands Attorney General, considering the change purely procedural, determined that there was no need to submit the First Addendum to the legislature for approval.

A second departure from the expected was the enactment, in October of 1978, of the Virgin Islands Coastal Zone Management Act (CZMA), 12 V.I.C. §§ 901-914 (1982 & 1987 Supp.). The general purpose of the Virgin Islands CZMA was to set up a comprehensive program for the management, conservation, and orderly development of the coastal area; the main method of implementing this program was a permit system run by the Coastal Zone Management Commission, a new unit of the Department of Conservation and Cultural Affairs. The

thrust of the CZMA is thus to require those wishing to engage in new development of the coastal area, whether on private or public lands, to obtain a permit to do so from the Virgin Islands Coastal Zone Management Commission, Federal permits for coastal area development in the Virgin Islands must often be obtained in addition to Virgin Islands permits.⁴

Section 910 of the CZMA sets forth conditions regarding when a Virgin Islands coastal zone permit is required and may be granted, and outlines the procedures for application. These conditions and procedures apply to both privately- and publicly-held land. However, § 911 imposes stringent additional restrictions and conditions on use or development of public lands. The most important of these additional restrictions, for purposes of this case, are those of §§ 911(a) and (d). These sections forbid conveyance of publicly-held coastal zone areas to private parties; they require a permit or lease for any development or occupancy of such areas, and limit the term of such permit or lease to a maximum of 20 years.⁵ Coastal zone permits for any use of public

⁴ In this case, for example, WICO's operations fall within 33 U.S.C. § 403, requiring federal approval for any excavation or fill within navigable waters, and 33 U.S.C. § 1344, requiring federal permits for discharge of dredged or fill material into navigable waters, and possibly within 33 U.S.C. § 1341, requiring federal permits for any discharge into navigable waters. Section 910(g) of the Virgin Islands CZMA states that where any development or occupancy in the coastal zone "require separate and distinct approval from the United States Government or any agency . . . thereof," the Virgin Islands "coastal zone permit shall be contingent upon receipt of all other such permits and approvals, and no such development or occupancy shall commence prior to receipt of all such permits and approvals."

⁵ A coastal zone permit that includes an occupancy or development permit, § 911(d)(1) provides, "shall not constitute a property right and shall be renewable only if the requirements of this section . . . are satisfied"; a coastal zone permit that includes an occupancy or development lease, § 911(d)(2) provides, "shall only

lands must provide for payment of rental fees; if the permit authorizes dredging, the permit must provide for reclamation fees. § 911(f)(1), (2). Fee schedules are set by the Coastal Zone Management Commission. § 911(f)(3). A coastal zone permit for public lands may be modified or revoked during its term, upon a determination by the Governor that revocation or modification is in the public interest and necessary to prevent significant environmental damage. § 911(g). The CZMA is careful to avoid retroactive effect by specifying that

[n]othing herein contained shall be construed to abridge or alter vested rights obtained in a development in the first tier coastal zone prior to the effective date of this chapter or any occupancy permit or lease of trust lands or other submerged or filled lands issued prior to the effective date of this chapter

§ 905(g).⁶

After passage of the CZMA, WICO promptly notified the Virgin Islands Legislature and Governor that it would consider application of the CZMA to it to be a material breach of the Memorandum of Understanding. Negotiations began, and by September of 1981 a compromise had been worked out. The basic terms of this bargain, embodied in a Second Addendum to the Memorandum of Understanding,⁷ were that WICO would give

be granted for a particular parcel of filled land and for a non-renewable lease period of not more than 20 years."

⁶ The "first tier" is defined as "that area extending landward from the outer limit of the territorial sea . . . to distances inland as specified in the maps incorporated by reference" § 902(r). WICO's grant area would apparently fall within the first tier.

⁷ The Second Addendum amended and restated the Memorandum of understanding as amended by the First Addendum. As it incorporates the entire agreement of the parties, no reference back to the Memorandum is necessary.

up about half of its remaining 30-acre claim in exchange for the Virgin Islands Government's promise to convey to WICO title to the 15 acres left.⁸ There are many additional conditions in the Second Addendum. WICO agreed, for example, to specified zoning restrictions and specified limited uses, to a height restriction of three stories, and to reserve a certain percentage of its area for "usable open space." § 11(b). These agreed-upon restrictions, however, apply only to development commenced within ten years of reclamation and completed within 15 years of reclamation; any development not commenced or completed within these time limits, and "any development beyond that explicitly contemplated by this Agreement," is controlled instead by the "then current laws," the CZMA or its future equivalent. § 12(a). In addition, the Second Addendum provides that "as to any matters not specifically covered by the Agreement, such as utilities, siting, performance standards, design and landscape, WICO shall be subject to the requirement of a Coastal Zone Management permit." § 12(b). The Virgin Islands Government, for its part, agreed in the Second Addendum that WICO was not to be subject to the charges mandated by § 911 for rental of or removal of dredge fill from publicly-held lands, and that WICO was to be able to use its land free of the use or rental charges imposed by § 911 on publicly-held land. § 19(e).

Like the Memorandum, the Second Addendum provides that after certain conditions are met, a Closing is to be held, at which conveyances and other documents are to be exchanged by the parties; transfer of title is accomplished after further conditions are met, most importantly completion of reclamation. Once WICO begins reclamation, as it has done, time limits within which

⁸ According to the intervenors, the eastern anchorage of St. Thomas harbor, the basin in which WICO's 15 acres is located, is about 400 acres. Moolenaar/Reed Br. at 3.

it must finish apply. The Second Addendum follows the Memorandum in stating that when the specified acreage has been reclaimed, "WICO shall have title to and ownership of the areas filled . . . provided that WICO is then in compliance with Section 2 of this Agreement requiring WICO to fill and provide land for the V.I. Government," and that "[e]xcept as otherwise specifically provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties, their successors and assigns." § 16(b). The Second Addendum also specifies that nothing contained in it is to affect the rights of the United States or Virgin Islands Governments to acquire by eminent domain or condemnation the lands covered by the Addendum. § 19(a).

A condition of the Second Addendum was that the CZMA be amended to exempt WICO from its provisions insofar as the Addendum replaced or nullified application of those provisions. The CZMA was duly amended by the Fourteenth Legislature on April 7, 1982 by Act No. 4700. Act No. 4700 added the following paragraph to the Coastal Zone Act:

(5) any treaty right, grant, or concession which was vested in any party prior to the date of enactment of this chapter and which in whole or in part has been expressly recognized by statute, court order, or lawfully executed agreement as binding on the Government of the Virgin Islands, whether such recognition precedes or succeeds the date of enactment of this chapter, and subject to any agreements or Memorandums of understanding pertaining to such right, grant, or concession which have been or may hereafter be ratified by law.

12 V.I.C. § 905(i) (5). In addition, Act No. 4700 ratified the Second Addendum "with the full force and effect of law" provided that "the Governor and Departments of the Government of the Virgin Islands, and all instru-

mentalities thereof are authorized and directed, within the scope of their jurisdiction, to execute the terms of such Agreement." App. at 116. Again, as the intervenors themselves maintain, there was no lack of opportunity for public comment on the Second Addendum and on Act No. 4700. *See supra* note 6.

On April 16, 1984, the federal court, acting sua sponte, entered an order pursuant to Fed.R.Civ.P. 41(b) dismissing for lack of prosecution the 1968 action by the Department of the Interior. No appeal was taken from this dismissal, and no motion to reopen has ever been filed.⁹ The intervenors, in connection with the present action, unsuccessfully moved for relief from the dismissal.

After the Second Addendum had been ratified and the CZMA amended, WICO began the lengthy process of obtaining permits for reclamation from the United States Army and the Virgin Islands Coastal Zone Management Commission. On March 9, 1983, WICO submitted an application for a federal permit to dredge and fill; WICO received, on February 14, 1985, a permit which would allow it to fill 7.5 acres, but on the condition that archaeological surveys be done prior to the start of any dredging operations.¹⁰ A Virgin Islands permit was

⁹ The intervenors' claim that the U.S. Department of Justice "protested the dismissal as error" is not well founded. The October 6, 1984 letter sent by the U.S. Attorney to the district court on this matter was "solely for [the court's] information and for no other purpose"; it informed the court that the Justice Department was in touch with the Interior Department

to determine whether the federal government has any present interest in reopening the litigation. When the Department of the Interior has completed its review and consideration of this matter, this office will take any appropriate action.

App. at 699. No further action was taken.

¹⁰ The Army permit only covers WICO's dredging and filling. It notes as "special conditions" not only the requirement that archae-

granted to WICO without substantial additional study, as the Virgin Islands Government considered itself bound by the Second Addendum and Act No. 4700 to allow WICO to proceed pursuant to the terms and limitations of that agreement. After doing the required archaeological surveys, WICO began dredging in June of 1986.

WICO's dredging operations created an immediate public uproar. In response, the Sixteenth Legislature called itself into special session and on July 9, 1986 approved a bill to repeal Acts No. 3326 and 4700. The Governor vetoed the bill, deploring the action to abrogate the "long-standing agreement to permit the limited further development of an already heavily developed harbor-front at Long Bay." App. at 131. The Legislature, again in special session, overrode the veto on August 11, 1986 to make the Repeal Act, Act No. 5188, law. Section 1 of the Repeal Act rescinds the two earlier measures, Acts No. 3326 and 4700, in their entirety; Section 2 provides that

Any and all activities that are conducted in Long Bay by the West Indian Company, Ltd., shall comply with the provisions of the Coastal Zone Management Act, Title 12, Chapter 21, Virgin Islands Code. Any permit for the development or occupancy of the submerged lands in Long Bay must be sent to the Governor for approval and the Legislature for ratification.

ological surveys be conducted prior to dredging, but also that another permit application be submitted to the Department of the Army for review prior to the construction by WICO of a marina on the filled land. The Army permit also repeats the requirement of the Second Addendum that the final plans for proposed development over the filled area be submitted to the Virgin Islands Department of Cultural and Conservation Affairs for review of siting, design, and the like.

App. at 130.¹¹ On August 18, 1986, the Virgin Islands Department of Conservation and Cultural Affairs issued a stop order to WICO on the ground that the permit already issued to WICO was no longer valid in light of the Repeal Act.

On August 14, 1986, WICO filed suit in the district court in the Virgin Islands seeking a temporary restraining order and a preliminary injunction against enforcement of the Repeal Act. A hearing on this motion was held on August 19, 1986, and a temporary restraining order forbidding any interference with WICO's dredging was granted at that time. A hearing on the preliminary injunction was scheduled for August 26, 1986.

At the August 14th hearing, the Virgin Islands Attorney General made a special appearance to advise the court that the executive branch of the Virgin Islands Government intended to decline to defend the suit, and to request the court's permission for the executive not to appear in the case. Because the executive branch considered the Repeal Act invalid, the Attorney General argued, appearance would violate Fed. R.Civ.P. 11 and constitute a breach of the Canon of Ethics. The court allowed the executive branch to bow out, not because of the ethics-based arguments but because it believed that for a federal court to force the executive to defend would constitute unwarranted interference in the political affairs of the Virgin Islands Government. The court then permitted the Legislature, and officers of several citizen groups supporting the Repeal Act, to intervene.¹² The citizen intervenors promptly moved to

¹¹ The CZMA mandates that CZMA permits for development or occupancy of publicly-held coastal areas be sent to the Governor for approval and the legislature for ratification; if the legislature is not in session, the Committee on Conservation, Recreation, and Cultural Affairs may ratify a permit. § 911(e).

¹² These officers include Helen Gjessing, president of Save Long Bay Coalition, Inc.; Lucien Moolenaar, president of Virgin Islands

compel the Attorney General to hire outside counsel to represent the Virgin Islands Government in the suit; this motion was denied. The citizen intervenors then filed cross-claims against both the executive and legislative branches of their government, charging that the Government's agreement to the Memorandum and Addenda constituted a breach of fiduciary duty and a violation of the citizens' constitutional rights. The claim against the legislative branch has since been dropped, but the citizen intervenors' claim against the executive branch remains. The citizen intervenors assert that the executive branch, for various reasons, should be required to pay the citizens' attorneys' fees and costs, plus any costs awarded to WICO.

At the August 26th hearing, the district court found that WICO had established a likelihood that it would prevail on the merits of its claim that the Repeal Act was an unconstitutional violation of the contract clause, that WICO would suffer irreparable harm absent issuance of an injunction, and that an injunction would be in the public interest. Based on these findings, the district court granted WICO's request for a preliminary injunction. *West Indian Co., Ltd. v. Government of the Virgin Islands*, 643 F. Supp. 869 (D.V.I. 1986). On appeal, this court, employing the narrow scope of review applicable in appeals from the issuance of a preliminary injunction, affirmed the decision of the district court. *West Indian Co., Ltd. v. Government of the Virgin Islands*, 812 F.2d 134 (3d Cir. 1987) (per curiam).

The district court granted summary judgment to WICO on April 13, 1986, converting the preliminary injunction into a permanent injunction. *West Indian Co.,*

2000, Inc.; Ruth Moolenaar, director of the St. Thomas Historical Trust, Inc.; Leonard Reed, president of the Virgin Islands Conservation Society, Inc.; and Kate Stull, president of the League of Women Voters of the Virgin Islands, Inc. All intervene in their personal capacities as well as their capacities as corporate officers.

Ltd. v. Government of the Virgin Islands, 658 F. Supp. 619 (D.V.I. 1987).

The intervenors appeal from the grant of summary judgment and a permanent injunction. Making substantially the same arguments here as before the district court, they contend, *inter alia*, that United States courts lack jurisdiction over this matter; that summary judgment was inappropriate; that there is no contract and thus no contract clause violation; that the public trust doctrine barred formation of a valid contract to convey title to any submerged land to WICO; and that the Repeal Act is a valid use of police power and, as such, withstands WICO's contract clause challenge. The intervenors also appeal from dismissal of their cross-claim against the executive branch. WICO reasserts on appeal both the contract clause argument with which it prevailed on summary judgment and a takings claim not reached by the district court.

II.

The intervenors challenge the exercise of subject matter jurisdiction by the district court, arguing that all rights of WICO arise under the 1917 Convention of Cession between the United States and Denmark and are therefore subject to the Convention's provision for dispute resolution.¹³ We disagree. What is at issue in this action is not the nature of the original grant to WICO, preserved in the Convention of Cession, but rather the nature of the agreements negotiated between WICO and the Virgin Islands Government.¹⁴ The determinative

¹³ The Convention provides that disputes unreasonable by negotiation between Denmark and the United States are to be brought before the Permanent Court of Arbitration at the Hague, which is still extant.

¹⁴ We do not accept the intervenors' argument that the Memorandum and Second Addendum are invalid as attempts to modify the Convention of Cession. The Convention created a right in

nature of the recent agreements, in particular the Second Addendum, will be evident from our discussion of the merits; it is also evident, we think, simply from the Repeal Act itself, which has nothing to do with the Convention of Cession but is directed to negating the Memorandum and Second Addendum. Constitutional issues arising in connection with the status of agreements made between a Virgin Islands corporation and the Virgin Islands Government, and dealing with rights to and uses of land located within the Virgin Islands, clearly fall within the subject matter jurisdiction of the District Court for the Virgin Islands. 48 U.S.C. § 1612; 4 V.I.C. § 32. Therefore, the district court properly exercised jurisdiction, and there is appellate jurisdiction in this court pursuant to 28 U.S.C. §§ 1291 and 1294(3).

III.

In determining whether a grant of summary judgment was appropriate, we must determine whether, viewing all reasonable inferences that may be drawn from the evidence in the light most favorable to the intervenors, no genuine issue of material fact exists and WICO is entitled to summary judgment as a matter of law. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied* 429 U.S. 1038 (1977). The Supreme Court recently offered the following guidance for identification of material facts:

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of

WICO to have the United States Government respect its original grant; surely WICO and the United States Government (or its successor in interest, the Virgin Islands Government) can subsequently negotiate a valid contract of settlement concerning the extent of WICO's rights.

summary judgment. Factual disputes that are irrelevant or unnecessary will not be countered.

Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1987).

In this case, the intervenors argue that they are entitled to summary judgment, and that summary judgment was improperly granted to WICO because material facts are in dispute. Items listed as disputed material facts by the intervenors include the proper translation and meaning of the terms used in the 1913 letters from the Danish Government to WICO; the intent of the parties to the 1913 letters as to the length of the grant of rights to WICO; whether the United States failed to assert the public's equitable interest in the area claimed by WICO; and whether the area claimed by WICO was being used for public trust purposes prior to WICO's dredging. As will be clear from our analysis of the substantive law applicable in this matter, disputes over these and other items claimed by the intervenors to be material facts are not "disputes over a fact that might affect the outcome of the suit under the governing law" and thus do not preclude summary judgment under the standard set forth by the Court in *Anderson*.

IV.

We now turn to the merits of this case. The first and most important of the issues we confront is whether or not there is a contract between WICO and the Virgin Islands Government, and whether the Repeal Act impairs that contract so as to conflict with the bar set by Article I, § 10, cl. 1 of the United States Constitution, incorporated by § 3 of the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1561, against any law "impairing the Obligation of Contracts."

In discussing this issue, the Supreme Court has said:

In general, a statute is itself treated as a contract when the language and the circumstances evince a

legislative intent to create private rights of a contractual nature enforceable against the State.

United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977).¹⁵ We therefore look to the language and circumstances of the agreements between the Virgin Islands Government and WICO to determine whether they evince the requisite intent to create private contractual rights in WICO enforceable against the Virgin Islands Government.

We begin with, and need go no further back than, the most recent agreement, the Second Addendum. Negotiated and ratified after title to the submerged lands had been transferred to the Virgin Islands and after the Virgin Islands CZMA had been passed, the Second Addendum is, in our view, the definitive agreement between WICO and the Virgin Islands Government. It is clear that both sides compromised legitimate claims in reaching this agreement. Clearly the Virgin Islands Government achieved significant benefits for itself. WICO traded a full half of its claimed acreage for definite recognition of its right to obtain title to the remainder, an area of only 15 acres or so. WICO also assumed a number of other obligations, and agreed to many conditions on the use and development of its land. The Second Addendum contains time

¹⁵ The Virgin Islands Government, although it remains an unincorporated territory lacking the sovereignty of a state, is treated like a state government as far as its contractual obligations are concerned. We have often recognized that the Revised Organic Act conferred upon the Virgin Islands "attributes of autonomy" similar though not equal to the full autonomy enjoyed by state governments. See, e.g., *Water Isle Hotel v. Kon Tiki St. Thomas, Inc.*, 795 F.2d 325, 327 (3d Cir. 1986); *In re Hooper's Estate*, 359 F.2d 569, 578 (3d Cir. 1966), cert. denied, 385 U.S. 903; *Harris v. Municipality of St. Thomas and St. John*, 212 F.2d 323, 327 (3d Cir. 1954). The attributes of autonomy relevant to this contract dispute are the authority to enter into binding contracts and to sue and be sued on those contracts; that the Virgin Islands Government has this authority cannot be gainsaid. See 48 U.S.C. § 1541.

limits within which WICO bound itself to act, and limits the number of years during which new development by WICO is not covered by the normal requirements of the CZMA. WICO has fully complied with, and has acted in reliance on, the Second Addendum; until pressure by the public in 1986 led to the passage of the Repeal Act, the Virgin Islands Government also acted in accordance with the Second Addendum and considered it binding.¹⁶ In addition to these circumstances, which seem to us to indicate legislative intent to enter into a binding contract with WICO, the language with which the Second Addendum concludes must not be overlooked:

Except as otherwise specifically provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties, their successors and assigns.

§ 16(b). Act No. 4700, the measure with which the Virgin Islands legislature ratified the Second Addendum after extensive debate and opportunity for public comment, not only amended the CZMA to recognize WICO's rights, but gave the Addendum "the full force and effect of law" and directed all officials and instrumentalities of the Virgin Islands Government to execute the Addendum's terms.

We conclude that there is unambiguous evidence here of legislative intent to create enforceable private rights in WICO and that the Second Addendum was intended by

¹⁶ We share the following view expressed by the district court:

[A]s of August, 1986, three successive elected governors, their respective attorneys general, and two separate Legislatures of the Virgin Islands have recognized WICO's rights to dredge and reclaim certain submerged lands in the harbor Charlotte Amalie. The various officials described above successfully negotiated limits with respect to both acreage and time as to WICO's rights, and gained important concessions in favor of the territory. The reason for this case is that the Sixteenth Legislature, now sitting, takes issue with the validity of the actions undertaken by the territorial officials above described.

643 F. Supp. at 873.

all concerned to be a binding contract between WICO and the Virgin Islands Government.¹⁷

V.

The intervenors contend that the public trust doctrine prevented the formation of any valid contract by Virgin Islands officials to convey submerged tideland to WICO. They make two arguments in support of this contention: first, that because the 1974 U.S. Territorial Submerged Lands Act conveyed all submerged lands to the Virgin Islands in an express trust, Virgin Islands officials had no authority to agree to convey any submerged lands out of trust to WICO; and second, that because the submerged lands in question here were always held in trust for the public under the common law, the lands could not be conveyed out of trust to WICO.

The first of these arguments need not long detain us. The Submerged Lands Act, passed in 1974, does indeed convey the submerged lands in trust, but does so "subject to existing rights." Existing rights include the right of WICO to reclaim and take title to at least 30 acres of specified submerged lands, as negotiated and agreed upon

¹⁷ Because we view the Second Addendum as definitively establishing contractual rights in WICO, we consider irrelevant the arguments made by the intervenors based on the rule against perpetuities and on alleged improper dismissal of the 1968 lawsuit. The intervenors assert that the 1913 grant of rights to WICO was in violation of the rule against perpetuities and, accordingly, invalid. We doubt that the act of a sovereign like Denmark's concession to WICO can violate the rule against perpetuities but we need not resolve that issue. WICO's rights under that concession were bargained away in the ensuing settlement negotiations and the rights it currently possesses arise out of the contract entered into in 1982 by WICO and the Virgin Islands Government. Similarly, the 1968 lawsuit by the Department of the Interior had been pending since the for almost a decade when the Second Addendum was signed; we agree with the district court that the 1968 suit was properly dismissed and had no further bearing on the relationship between WICO and the Virgin Islands Government.

in 1973 by both the United States and Virgin Islands Governments in the Memorandum of Understanding. Given this explicit exception, the Submerged Lands Act cannot be held to create a trust that would prevent conveyance to WICO, pursuant to an amendment of the Memorandum, of a maximum of about 15 acres of the specified submerged lands.

The second basis for the intervenors' public trust argument, the common law public trust doctrine, deserves more attention. In evaluating this argument we look to the "rules of common law . . . as generally understood and applied in the United States."¹⁸ We begin with the leading case of *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387 (1892). There, the state legislature had transferred ownership of the submerged area of the entire waterfront of Chicago, over 1000 acres, to the railroad; four years later, a new legislature sought to revoke the transfer, and was challenged by the railroad. The revocation was upheld by the Court, which described title to the land under the harbor as:

different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing

¹⁸ Under 1 V.I.C. § 4, the "rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply in the absence of local laws to the contrary." The common law public trust doctrine is not expressed in a restatement. Moreover, when the Virgin Islands legislature approved the Second Addendum in 1982, there were no relevant local laws. While the CZMA had been enacted in 1978, the legislation ratifying the Second Addendum amended that statute to grant grandfather status to rights, like WICO's, that had been recognized by legislative action.

therein freed from the obstruction or interference of private parties.

146 U.S. at 452.¹⁹

Submerged lands are thus impressed with a trust for the benefit of the public, and the sovereign's use and disposition of those lands must be consistent with that trust. This does not mean, however, that a sovereign may under no circumstances convey submerged lands to a private party. To the contrary, the Supreme Court in the *Illinois Central* case expressly noted that alienation in furtherance of trust purposes was permissible:

The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the land and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not

¹⁹ There are a number of still older Supreme Court cases establishing that the United States, on acquiring territory, holds title to tidal lands in trust to be transferred to future states or territorial governments. See, e.g., *Weber v. Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65 (1873); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845).

consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.

146 U.S. at 452-53.

These same principles were reconfirmed by the Supreme Court two years later in the context of congressional action regarding land as to which the sovereign prerogative belongs to the federal government:

We cannot doubt, therefore, that Congress has the power to make grants of land below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

Shively v. Bowlby, 152 U.S. 1, 47-48 (1894).²⁰

²⁰ When the federal government of the United States came into being, it held sovereign power, and had concomitant fiduciary duties,

While the common law public trust doctrine varies from state to state and has been altered by statute and in a number of state constitutions, see *Phillips Petroleum Co. v. Mississippi*, 56 U.S.L.W. 4143, 4145 (Feb. 23, 1988), the doctrine has developed in a manner consistent with the analysis of *Illinois Central* and *Shively*. The courts carefully scrutinize any conveyance of submerged lands to determine if it is in complete congruence with the fiduciary obligations owed to the public by the sovereign. If the conveyance represents a deliberate and reasonable decision of the sovereign that the transaction of which the conveyance is a part affirmatively promotes the public interest in the submerged lands, the courts have deferred to the sovereign's decision. See Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich. L. Rev. 471 (1970); W. Rodgers, *Environmental Law* § 2.16 (1977); 1 V. Yannecone & B. Cohen, *Environmental Rights and Remedies* § 2.3 (1972). Accordingly, the issue before us is whether, in 1982, the Virgin Islands legislature's ratification of the Second Addendum was consistent with its fiduciary obligation to manage and control the lands beneath the harbor at Charlotte Amalie for the ben-

with respect to all public trust lands not already subject to the sovereignty of the original states. When the United States subsequently acquired more territory, the federal government held all submerged and tidal lands within the newly acquired acreage in trust, for future transfer to states; as new states came into being, they replaced the federal government as sovereign and fiduciary. Under the Constitution, of course, Congress has a paramount interest in the areas of navigation and commerce, and paramount powers to take action necessary to fulfill international obligations. With regard to submerged and tidal lands, the status of the Virgin Islands, as previously noted, is somewhat different from that of the states; the Virgin Islands did not acquire sovereign power over trust land within its borders by means of statehood, but rather through transfer by Congress pursuant to the 1974 Territorial Submerged Lands Act. With the Submerged Lands Act, Congress turned over to the Virgin Islands Government both sovereign power and fiduciary obligations with respect to public trust lands within the Virgin Islands.

efit of the public. We hold that its ratification was in furtherance, not in derogation, of that obligation, and therefore sustain the validity of its action.

In 1982, the Virgin Islands legislature was confronted with a bona fide dispute over the issue of whether WICO had continuing rights in up to 42 acres of submerged land in the harbor. Wico's claim rested on a conveyance from the Danish government, alleged to be perpetuity, which predated the transfer of the Islands to the United States and which the Convention of Cession called for the United States to consummate through a fee simple conveyance; if that claim were adjudicated in its favor, WICO would be entitled upon reclamation to fee simple title to all 42 acres free of any public trust. This would follow not only from the well-established principle that submerged lands may be conveyed free of trust to satisfy international obligations *Shively, supra*; *Montana v. United States*, 450 U.S. 544, 551-52 (1981), *reh'g denied* 452 U.S. 911, but also the holding of *Knight v. United States Land Ass'n*, 142 U.S. 161, 183-84 (1891), that the public trust doctrine "does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way."

Though confronted with the possibility, if not the probability, that the sovereign and its public beneficiaries would wind up with no interest in the disputed 42 acres, the legislature had available an attractive alternative in the Second Addendum, negotiated with WICO by the Virgin Islands executive. By ratifying that agreement, the legislature, first and foremost, could remove the cloud from the title to all but 15 of the disputed acres, making sure that those lands would henceforth be impressed with a public trust. This would allow planning for the development of the harbor in the public interest to go forward on a timely basis, unhindered by uncertainties about ownership rights and future litigation.

While the greatest, this was not the only incentive the legislature had to exercise its fiduciary discretion in favor of the proposed settlement. Under the Second Addendum, WICO was to make a substantial contribution to the development of the harbor.²¹ As the district court noted, the Memorandum explained that the settlement would "satisfy a compelling public need" in the following respects:

(1) An additional 2½ acres will be added by WICO to the public recreation area near Pearson Garden, thus doubling its size;

(2) Filled land for the waterfront highway to permit widening from two to four lanes will be provided by WICO.

(3) Dredging the harbor in Long Bay will be provided by WICO, thereby benefiting navigation and promoting tourism;

(4) The reclamation will enlarge the area of level land for development near the downtown area of Charlotte Amalie now limited because of the hilly terrain;

(5) The development contemplated on the reclaimed lands for marinas, cruise ship berths, offices and other like facilities will provide additional employment for residents of St. Thomas and enhance tourism facilities

643 F. Supp. at 878.

Finally, the record shows no reason for the legislature to have thought that the proposed settlement would in

²¹ Harbor development, as we have noted, has consistently been recognized as a legitimate public purpose for which submerged land may be conveyed out of trust. *E.g.*, *Appleby v. New York*, 271 U.S. 364, 399 (1929) (overturning on contract clause grounds New York's attempted invalidation of a grant of title to roughly 18 acres of submerged ground for purpose of harbor development); *City of Milwaukee v. State*, 193 Wisc. 423, 214 N.W. 820 (1927) (Milwaukee allowed to convey out of trust, for purpose of harbor development, land ceded to Milwaukee by state).

any way impair its ability to manage and control the harbor in the future for the benefit of the public. The basin in which the disputed acreage is located is approximately 400 acres in area, and this basin is only a part of the total harbor. The lands to be conveyed to WICO under the Second Addendum thus constitute a small fraction of the harbor. Moreover, the provisions of that agreement assured the legislature that WICO's development of its acreage would be limited in scope and would not substantially interfere with navigation or commerce. The absence of any such substantial interference was also ensured by the federal permit requirement, and is evidenced by the actions of the permitting authorities in allowing WICO to proceed with the development as it has done.

Given these circumstances, we cannot fault the legislature's decision to approve the Second Addendum. Approval was clearly consistent with the fiduciary obligations of the legislature. For this reason, we conclude that the public trust doctrine did not bar the formation of a valid contract involving the conveyance of 15 acres of submerged land to WICO.

V.

The intervenors' final argument in support of the Repeal Act is that the Act is a valid use of the police power, and that the police power cannot be limited by contract. We find this argument unpersuasive. Although the prohibition of the contract clause is circumscribed, often sharply, by the inherent police power of the state, there are limits to this circumscription. Police power, the Supreme Court has said,

is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contract between individuals. . . . If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some*

limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241-42 (1978), *reh'g denied* 439 U.S. 886 (1978); *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983).²²

In *Energy Reserves*, the Supreme Court set forth a three-step analysis to be used in cases where contract clause claims must be balanced against legislation passed in exercise of police power:

The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." . . . If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem. . . . Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is base] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." . . . Unless the State itself is a contracting party . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

459 U.S. at 411-412 (citations omitted). This court recently applied the *Energy Reserves* analysis in *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987) (amendment of Virgin Islands Workmen's Compensation Act to retroactively eliminate application of the "borrowed employee" doctrine as a bar to pending

²² It is not disputed that the Virgin Islands Government has police power similar to that of a state.

tort suits constituted unjustified impairment of contract), and we will now apply it here.

We have already found that the Second Addendum constitutes a contract between WICO and the Virgin Islands Government; we begin here with the question whether the contract contained in the Second Addendum is substantially impaired by the Repeal Act. There can be no doubt that it is. Under the Second Addendum, WICO "shall have title to and ownership of the areas filled"; WICO may use its reclaimed land free of rental charges; and WICO is subject, for a limited time, to development restrictions contained in the contract rather than those of the CZMA. If the Repeal Act is enforced, however, WICO will be reduced to the status of a mere applicant for a permit under the CZMA; WICO will never take title to the areas it fills, if it is allowed to fill any; WICO will always have to pay rental charges for use of any land it is allowed to reclaim; and WICO will be subject to all the restrictions of the CZMA, including the requirement that any permit it obtains be ratified by the legislature and approved by the governor. Clearly, WICO's contract rights are gravely impaired, to the point of virtual annihilation, by the Repeal Act. That the coastal zone area is generally subject to considerable regulation does not, in our view, lessen the severity of the impairment of WICO's contract rights.

Turning to the second step of the analysis, we find the Repeal Act's purpose too narrow in scope to justify the substantial impairment that it effects. Although it may be said that the Repeal Act is addressed to the public interest in the sense that it provides no benefit to special private interests, abrogating the contract with WICO and retaining title, albeit a heavily clouded one, to the 15 acres of submerged land at issue is not a "significant" public purpose, and is by no stretch of the imagination a remedy for a "broad or general social or economic problem." The Repeal Act is by its own terms directed at a

single company and a single 15-acre area. In this way, it is similar to the legislation we struck down in *Nieves*, which we found to be directed at a single company, and similar to the legislation struck down by the Court in *Allied Structural Steel*. The following considerations discussed in *Allied Structural Steel* are apposite here:

This Minnesota law simply does not possess the attributes of those state laws that have in the past survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. . . . It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken. . . . It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively. . . . And its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

438 U.S. at 250. In this instance, the legislation is even narrower in scope than the Minnesota legislation found objectionable by the Court. Accordingly, we conclude that the Repeal Act cannot be justified by a significant public purpose.

The final step of the analysis calls for us to determine whether the Repeal Act's adjustment of WICO's rights is a reasonable and appropriate accommodation in light of any legitimate public purpose supporting the Act. Because the Virgin Islands Government is a party to the contract, we need not defer to the judgment of the Sixteenth Legislature, but "may inquire whether a less drastic alteration of contract rights could achieve the

same purpose and whether the law is reasonable in light of changed circumstances." *Nieves*, 819 F.2d at 1243. Since we have found no legitimate public purpose supporting the Repeal Act, we need not reach this final step. With respect to the reasonableness of the Repeal Act, however, we note that the Sixteenth Legislature did not even purport to base its action upon any facts or circumstances not existing and well known to its predecessor at the time the Second Addendum was approved. The only circumstance that has arguably changed since 1982 is the force of public opinion.

We hold only that the Repeal Act is invalid. We do not, of course, hold that the police power of the Virgin Islands with respect to WICO's 15 acres was exhausted when the Second Addendum was approved. WICO is obviously not immune from generally applicable police power measures not inconsistent with the Second Addendum. Moreover, if conditions materially change so as to create a substantial problem that could not be foreseen in 1982, it may be that generally applicable land use regulations could validly alter the manner in which WICO may utilize its property. We are not at present confronted with an issue, however, and express no opinion with respect to it.

VI.

The remaining issue is the intervenors' claim against the executive branch of the Virgin Islands Government.²³ The citizen intervenors now contend that the executive branch, by declining to defend this suit or hire outside counsel to defend it, breached its fiduciary duty and violated the citizens' constitutional rights.

²³ The intervenors filed a cross-claim under Fed. R. Civ. P. 13(g) against the executive branch; as Rule 13(g) applies only to co-parties, and neither the "executive branch" nor any members thereof are parties to this action, this filing cannot be correct. However, the procedural irregularity may be ignored in light of our conclusion on this issue.

We agree with the district court that the Virgin Islands executive owed the intervenors no duty to defend this suit or to hire outside counsel to do so. The statute cited by the intervenors as imposing on the executive branch a duty to represent the Government, 3 V.I.C. § 114, provides only that the Virgin Islands Attorney General is to represent the executive branch of the Virgin Islands Government; this does not say or mean that the executive branch must defend whenever the Virgin Islands Government is sued. There is simply no authority for the intervenors' contention that the executive branch of a territory must defend a challenge to the constitutionality of an act of its territorial legislature when the executive branch is of the view that the legislative action is constitutionally infirm.²⁴ We decline to establish such a precedent.

VII.

For the foregoing reasons, we will affirm the grant of summary judgment and a permanent injunction to WICO, as well as the dismissal of the citizen intervenors' cross-claim against the executive branch of the Virgin Islands Government.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

²⁴ This is not a rare situation. See, e.g., *Karcher v. May*, 108 S. Ct. 388, 391 (1987) (presiding officers of New Jersey legislature sought and obtained permission to intervene when neither state attorney general nor other named defendants would defend minute-of-silence statute passed over governor's veto). Accordingly, we find the absence of any authority for the intervenors' position significant.

DISTRICT COURT, VIRGIN ISLANDS
D. ST. THOMAS AND ST. JOHN

Civ. No. 1986/293

THE WEST INDIAN COMPANY, LIMITED,
Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Defendant,

v.

THE LEGISLATURE OF THE VIRGIN ISLANDS, HELEN W. GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of the V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of the St. Thomas Historical Trust, Inc.,
Intervenors.

April 13, 1987

Maria T. Hodge, St. Thomas, V.I., Sanford C. Miller, New York City, for The West Indian Co., Ltd.

Rhys S. Hodge, St. Thomas, V.I., for Legislature of the Virgin Islands.

David A. Bornn, Edith L. Bornn, Judith L. Bourne, Benjamin A. Currence, Pallme & Mitchell, Veronica J.

Handy, Stedmann Hodge, Brenda Hollar, David Iverson, Aurelia Rashid, Birch, deJong & Farrelly, Denise Reovan, Law Offices of Desmond Maynard, St. Thomas, V.I., for intervenors Gjessing, et al.; Gilbert L. Finnel, Jr., Houston, Tex., of counsel.

MEMORANDUM OPINION

DAVID V. O'BRIEN, District Judge.

The plaintiff and Helen W. Gjessing, *et al.*, as citizen intervenors, have each filed a motion for summary judgment in this matter. The Legislature of the Virgin Islands, as intervenor, opposes the plaintiff's motion. We grant summary judgment herein in favor of the plaintiff, and deny the relief sought by the citizen intervenors. By so doing, we convert a previously entered preliminary injunction into a permanent injunction, barring interference with the plaintiff's rights under a Memorandum of Understanding entered into in 1973, and certain Addenda thereto.

I. FACTS

This case has previously been the subject of a lengthy published opinion. *West Indian Co. v. Government of the Virgin Islands*, 643 F.Supp. 869 (D.V.I.1986), *aff'd*, 812 F.2d 134 (3d Cir.1987).

The material facts were spelled out in detail in that opinion. Since its issuance, additional documents have been filed in conjunction with the motion for summary judgment, but they do not alter the essential fact pattern or the legal interpretation of those facts.

For the purpose of deciding the motions before us, we adopt in full the findings of fact as recited in *West Indian Co.*, *supra*, at 870-873. Since the record before us is almost exclusively documentary, the material facts are not in dispute. The legal interpretation of those facts, however, is sharply contested.

The prior opinion was issued upon a motion for a preliminary injunction, whereby the plaintiff sought to enjoin the Government of the Virgin Islands and other parties from interference with its rights to dredge and fill land in St. Thomas harbour under a certain Memorandum of Understanding dated October 3, 1973. The Memorandum had previously been approved as to content by the Legislature of the Virgin Islands by Act No. 3326 in 1972. The plaintiff, the United States of America, and the Government of the Virgin Islands were parties to that agreement, as were certain other persons. Subsequent to its execution, two Addenda were also entered into, one of which was substantive in nature. It was also approved by the Legislature of the Virgin Islands by Act No. 4700 in 1982.

The Memorandum of Understanding was intended to resolve a dispute among the parties as to the rights of the plaintiff preserved in the 1917 treaty between Denmark and the United States by which the Virgin Islands became a possession of the United States. In effect, it settled a law suit over the nature and extent of those rights, brought by the United States under Civil No. 1968/337 (St. Thomas & St. John Division).

The subsequent Addenda further clarified the plaintiff's rights and left the plaintiff free to commence the dredging and filling of submerged lands in St. Thomas harbour. This it proceeded to do in 1986. The resulting public furor caused the duly elected members of the Legislature to enact, over the governor's veto, Act. No. 5188, repealing Acts Nos. 3326 and 4700, which, in effect, repudiated the Memorandum of Understanding and its Addenda. This, of course, wiped out all of plaintiff's agreed-upon dredging rights, and led to the law suit herein.

As noted earlier, a full exposition of the facts is contained in *West Indian Co.*, *supra* at 870-873.

The grant of a preliminary injunction to the plaintiff was appealed to the Third Circuit on a variety of grounds, only some of which had been raised in this Court earlier.

II. DISCUSSION

A. *The Motions for Summary Judgment*

It is well settled that cross-motions for summary judgment do not warrant the court in granting summary judgment unless once [sic] of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed. *Manetas v. International Petroleum Carriers, Inc.*, 541 F.2d 408, 413 (3d Cir.1976); *Rains v. Cascade Industries, Inc.*, 402 F.2d 241, 245 (3d Cir. 1968); *F.A.R. Liquidating Corp. v. Brownell*, 209 F.2d 375, 380 (3d Cir.1954).

The party who moves for summary judgment has the burden of demonstrating that there is no genuine issue of fact. *Kress, Dunlap & Lane, Ltd. v. Downing*, 286 F.2d 212, 215 (3d Cir. 1960). As we have previously stated, the facts in this case are largely drawn from submitted documents. They are not genuinely disputed.

B. *Assertions of the Parties*

In their response to the plaintiff's motion for summary judgment, and in their own cross-motion for summary judgment, the citizen intervenors raise essentially the same legal arguments which were raised earlier to no avail on the same set of material facts. Likewise, the Legislature of the Virgin Islands makes the same argument it made before us originally, and thereafter on appeal to the Third Circuit.

The primary arguments, made in this Court earlier, on appeal, and again with reference to summary judgment, are:

(1) The public trust doctrine prevented the government from being a party to the 1973 Memorandum of Understanding and Addenda thereto. Therefore, the government acted illegally and the repeal of those actions by a subsequent legislature was valid.

(2) The repeal of the previous agreements entered into by the government was a valid exercise of the police power, even in the face of the Contract Clause contained in the U.S. Constitution Art. I, Section 10 and the Revised Organic Act of 1954, Section 3.

The citizen intervenors and the Legislature repeat these arguments again in their filings concerning the motions for summary judgment. These same arguments were rejected by us in *West Indian Co. v. Government of the Virgin Islands*, *supra*, 643 F. Supp. at 873-883. They were also rejected without discussion by the Third Circuit. 812 F.2d 134 (1987).

No additional material facts have been presented since the time of our earlier opinion, and no new or more persuasive legal arguments have been offered by any of the intervenors which would cause us to alter our previous legal rulings with reference to the public trust doctrine and the police power assertions. We stand on our previous rulings concerning these contentions, and once again, reject them.

The intervenors do raise before us a new claim that the Rule Against Perpetuities was violated by the Memorandum of Understanding and its Addenda. This argument was briefed and presented to the Third Circuit in the appeal of our entry of a preliminary injunction. The Third Circuit, at page 135, noted that it had given "full consideration of the matters set forth in the briefs and at oral argument". Thus, we assume that the contentions concerning the Rule Against Perpetuities were considered and rejected by the Third Circuit. Since this is our first review of this argument, we discuss it briefly.

The common law Rule Against Perpetuities is enunciated in the Restatement of Properties (1944), Sections 370-403, and the Restatement (Second) of Properties (1981) Section 1.1-2.2. The citizen intervenors contend that because the rule is contained in the restatements of the law, it must be applied in the instant case under Virgin Islands law. We disagree. The Rule Against Perpetuities is inapplicable to the matter herein. Title 1, Section 4 of the Virgin Islands Code states:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, *in the absence of local laws to the contrary.* (emphasis added)

In this instance the Memorandum of Understanding, dated October 9, 1973, was executed by the governor of the Virgin Islands only after its terms had been previously approved by the Ninth Legislature of the Virgin Islands on October 30, 1972 (Act No. 3326). Likewise, the Second Addenda to the Memorandum of Understanding, dated September 22, 1981, was ratified and approved by the Fourteenth Legislature on April 7, 1982 (Act No. 4700). By its terms, the Second Addenda has "the full force and effect of law."

It is clear, then, that even if applicable, the Rule Against Perpetuities was modified by adoption of local laws to the contrary.

The Restatement of Property (1944) in effect until 1981, recognizes that the Rule Against Perpetuities is the common law of each jurisdiction in the United States only "[i]n the absence of a statutory abrogation or modification." Restatement of Property, Part I, Intr. Note, p. 2133. The same language is carried over in the

Restatement (Second) of Property adopted in 1981, Vol. I, p. 11. The effect of a legislative enactment is to supercede the common law rules. *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E.2d 207, 213 (S.C. Ind. 1981); *Drennan v. Security Pac. Nat. Bank*, 28 Cal.3d 764, 170 Cal. Rptr. 904, 621 P.2d 1318, 1327 (S.C. Cal.), cert. denied 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 112 (1982).

This remaining primary argument of the citizen intervenors, is, therefore, without merit.

The citizen intervenors, beyond the three primary arguments, raise a variety of other issues on pages 66-68 of their brief in response to plaintiff's summary judgment motion. Many of them are subsumed in our discussion of the three primary contentions. The remainder of them are without merit, being listed as disputes of material facts, when in reality they are legal arguments and/or interpretations of facts not actually in dispute

III. CONCLUSION

We have discussed the public trust and the police power vs. contract clause arguments in our earlier opinion. We discussed the final primary argument concerning the applicability of the Rule Against Perpetuities herein. We conclude that the plaintiff is entitled to a permanent injunction, enjoining the Government of the Virgin Islands and all intervenors from interference with the rights of the plaintiff arising under the Memorandum of Understanding and its Addenda. Act No. 5188 is an unconstitutional interference with those rights, a violation of the Contract Clause as contained in both the Constitution and the Revised Organic Act.

Since the counterclaim by the citizen intervenors and their cross claim against other parties are rendered moot by the grant of a permanent injunction, they will be dismissed.

ORDER

THIS MATTER came before the Court on a motion by the plaintiff for summary judgment and a cross-motion by Helen W. Gjessing, *et al.* for summary judgment. The plaintiff also previously filed a motion to dismiss the counterclaim and the Government of the Virgin Islands moved to dismiss the citizen intervenors' cross claim. The Court having filed its memorandum opinion of even date herewith, now therefore it is

ORDERED:

THAT the motion of the plaintiff for summary judgment is GRANTED, and a permanent injunction will issue thereon; and

THAT the motion of Helen W. Gjessing, *et al.* for summary judgment is DENIED; and

THAT the motion of the plaintiff to dismiss the counterclaim is GRANTED, and it is hereby DISMISSED, WITH PREJUDICE; and

THAT the motion of the Government of the Virgin Islands to dismiss the cross claim of Helen W. Gjessing, *et al.* is GRANTED, and it is hereby DISMISSED WITH PREJUDICE.

PERMANENT INJUNCTION

THIS MATTER is before the Court on motion of the plaintiff for summary judgment, and a cross-motion of Helen W. Gjessing *et al.* for summary judgment. In an opinion issued of even date herewith, we find that the adoption by the Legislature of the Virgin Islands of Act No. 5188, which repealed Acts Nos. 3326 and 4700, is an unconstitutional interference with the rights of the plaintiff under a certain Memorandum of Understanding dated October 3, 1973, and Addenda thereof, dated October 28, 1975 and September 22, 1981 respectively. The

Government of the Virgin Islands was a party to the Memorandum of Understanding and its Addenda, and the substantive contents were approved by the Legislature by Acts Nos. 3326 and 4700.

The premises considered, now therefore it is

ORDERED and ADJUDGED.

THAT the Government of the Virgin Islands, the Legislature of the Virgin Islands and the citizen intervenors above captioned, be and the same are PERMANENTLY ENJOINED from any and all interference with the rights of The West Indian Company, Limited, arising under the Memorandum of Understanding dated October 3, 1973, as amended on October 28, 1975 by the First Addendum, and on September 22, 1981 by the Second Addendum thereto.

50a

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 86-3577, 86-3578

WEST INDIAN COMPANY, LTD.,
Plaintiff/Appellee,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Defendant,

and

LEGISLATURE OF THE VIRGIN ISLANDS,
Intervenor/Appellant,

and

HELEN G. GJESSING, LEONARD REED, KATE STULL,
LUCIEN MOOLENAAR, RUTH MOOLENAAR,
Intervenors/Appellants.

LEGISLATURE OF THE VIRGIN ISLANDS,
Appellant in No. 86-3577,

HELEN G. GJESSING, *et al.*,
Appellants in No. 86-3578.

Argued Feb. 17, 1987

Decided Feb. 26, 1987

Maria Tankenson Hodge, St. Thomas, V.I., Sanford C. Miller (argued), Christopher G. Kelly, Haight, Gardner, Poor & Havens, New York City, for appellee West Indian Co., Ltd.

David A. Bornn (argued), Edith L. Bornn, Judith L. Bourne, Benjamin A. Currence, Veronica J. Handy, Brenda J. Hollar, David W. Iverson, Aurelia O. Rashid, Denise Reovan, St. Thomas, V.I., Gilbert L. Finnel, Jr., Houston, Tex., of counsel, for intervenors-appellants Helen Gjessing, et al.

Rhys S. Hodge (argued), St. Thomas, V.I., for Legislature of the Virgin Islands.

Before GIBBONS, Chief Judge, SLOVITER, Circuit Judge, and SCIRICA, District Judge.*

OPINION OF THE COURT

PER CURIAM.

The district court entered an order on September 30, 1986 enjoining the Government of the Virgin Islands, the Virgin Islands legislature and the citizen intervenors in this action from interfering with the rights of the Plaintiff, The West Indian Company, Ltd., under the 1973 Memorandum Agreement [entered into between WICO, the United States Government and the Government of the Virgin Islands], and Addenda thereto, pending a final hearing in this case on the merits. App. at 460-61, 643 F.Supp. 869. The Legislature of the Virgin Islands, as intervenor/appellant, and the citizens/intervenors have appealed from that order. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

A preliminary injunction may be granted if the moving party demonstrates:

(1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured pendente lite if relief is not granted. Moreover, while the burden rests upon the moving party to make these two requisite showings, the dis-

* Hon. Anthony J. Scirica, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

strict court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest."

Professional Plan Examiners of New Jersey, Inc. v. LeFante, 750 F.2d 282, 288 (3d Cir.1984) (quoting *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir.1982)).

The grant or denial of a preliminary injunction is committed to the sound discretion of the district court, which must balance all of the relevant factors in making a decision. *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir.1982) (in banc). Consequently, the scope of appellate review of a trial court's ruling on a motion for preliminary injunction is narrow, and the trial court's judgment is presumptively correct. *Id.*

After full consideration of the matters set forth in the briefs and at the oral argument, we cannot conclude that the district court committed an error in applying the law or that the grant of the preliminary injunction represented an abuse of discretion. We are confident that in light of the respective interests at issue, the district court will proceed as promptly as possible to a final disposition in this matter.

For the foregoing reasons, we will affirm the order of the district court.

DISTRICT COURT, VIRGIN ISLANDS
D. ST. THOMAS AND ST. JOHN

Civ. No. 1986/293

THE WEST INDIAN COMPANY, LIMITED,
Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Defendant,
and

THE LEGISLATURE OF THE VIRGIN ISLANDS, HELEN W. GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of the V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., and RUTH MOOLENAAR, Individually and as Director of the St. Thomas Historical Trust, Inc.,

Intervenors.

Sept. 3, 1986

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Rhys S. Hodge (argued), St. Thomas, V.I., for Legislature of the Virgin Islands.

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MEMORANDUM OPINION AND ORDER

DAVID V. O'BRIEN, District Judge.

For 73 years The West Indian Company, Limited has had rights of reclamation in the principal harbor of St. Thomas. These rights were preserved in the 1917 treaty between Denmark and the United States whereby the Virgin Islands became a United States possession. They have been conceded and accepted by every territorial elected governor, their attorneys general, and two separately elected territorial legislatures. The issue before us is whether these rights, now contained in a contract to which the territorial government is a party, may be extinguished by the presently sitting legislature pursuant to its reserved power.

We find that they may not, and we will enter a preliminary injunction to enjoin interference with the rights contained in the original contract and its addenda.

I. FACTS

This controversy has its genesis in a 1913 grant by the Government of Denmark to the plaintiff herein, ("WICO"), of substantial rights to reclaim and fill designated portions of Charlotte Amalie harbor, St. Thomas. These rights were specifically preserved in the 1917 treaty between the United States and Denmark which ceded the Virgin Islands to the United States. The Treaty provides at Section 3:

4) The United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:

a. The concession granted to 'Det Westindiske Kompagni' (The West Indian Company) Ltd. by the communications from the Ministry of Finance of January 18th 1913 and of April 16th 1913 relative to a license to embark, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor.

The question whether the grant to WICO was in perpetuity or whether it had a termination point, was cleared up in advance of the treaty by communications from the Government of Denmark to the United States in response to the latter's inquiry. Denmark made clear that the grant to WICO was in perpetuity, without limitation as to the time within which the license was to be exercised.

Notwithstanding the exchange of communications which indicated that the grant to WICO was without a time limitation, the United States initiated a civil action in District Court, Division of St. Thomas, in 1968. (Civ. No. 1968/337). In it, the Justice Department sought to have the District Court declare WICO's rights terminated. While the case was pending, the Danish Government sent a diplomatic note dated June 17, 1970, to the Government of the United States, requesting it to respect the WICO concession.

Thereafter, the Hon. Warren H. Young, U.S. District Judge assigned to the case, noted the obvious difficulty the United States would have in terminating WICO's rights in the face of its knowledge, prior to the Treaty, that they were without time limitations. He also viewed the involvement of the Government of the Virgin Islands, not then a party to the case, as a prime necessity in order

to protect its own vital interests. The result of Judge Young's concerns was a letter to Governor Melvin H. Evans, the territory's first elected governor, urging him to become personally involved in a settlement of the case.

Settlement negotiations involving the United States, the territorial government, WICO and other parties to the lawsuit resulted in a settlement proposal by WICO which found favor with the territorial government. Public hearings were held on the matter and the settlement was referred to the Legislature of the Virgin Islands for ratification and approval. On October 11, 1972, the Legislature approved Act No. 3326, and the Governor formally affixed his approval to this legislation on October 30, 1972.

The formal Memorandum of Understanding, (hereafter "Memorandum"), dated nearly a year later, October 3, 1973, was signed by representatives of the United States, the Virgin Islands, and WICO, among others. One of the most significant aspects of the Memorandum is that the acreage of the concession granted WICO was measurably reduced and the territorial government received rights to other lands it did not previously possess. These are only two of the major provisions of the 35 page Memorandum.

There is no question that the Memorandum was a full settlement of the litigation initiated by the United States in 1968, since both the Memorandum and Act No. 3326 ratifying and approving the settlement speak to that point. It is also important to note that the Attorney General of the Virgin Islands was required to approve the Memorandum (and subsequent Addenda) relative to the authority of the territorial officials to enter into such agreement, and to determine that the documents were legal, binding and valid.

The Memorandum contains an elaborate procedure for transfer of the submerged lands to WICO once both

parties, the Virgin Islands Government and WICO, fulfilled certain preconditions. To date many of these conditions remain unfulfilled awaiting completion of the dredging and filling. One nuance of these procedures which needs explanation is the transfer of the lands from the United States.

In the Memorandum, the Justice Department took the view that the settlement proposal encompassed important matters outside the scope of the lawsuit and therefore required any disposition of property to be made under the then existing Territorial Submerged Lands Act. 48 U.S.C. § 1701 *et seq.* (Supp.1986) (See pg. 7 the Memorandum). At that time the United States held title to all submerged lands surrounding the Virgin Islands, subject, of course, to WICO's rights preserved in the Treaty. The Memorandum, to recognize the United States' claim to these lands, included a two-step conveyance procedure, ("transfer procedure"), to occur at closing. First, the lands was to be conveyed from the Secretary of the Interior to the Virgin Islands Government and only then reconveyed to WICO. (See § 6(a) of Memorandum at pg. 14). This procedure became moot as of October 5, 1974, because control of these submerged lands was transferred from the United States to the Government of the Virgin Islands, subject to valid existing rights. 48 U.S.C. Section 1704 *et seq.* (Supp.1986).

A First Addendum to the Memorandum of Understanding was entered into on October 28, 1975, to reflect this transfer of control to the territorial government over submerged lands. A \$45,000 annual payment, previously made to the U.S. Department of Interior by WICO, was from that time to go to the territorial government. The attorney general determined that the First Addendum need not be submitted to the Legislature. In effect this addendum recognized there was no longer a need for the two-step conveyance since the United States no longer held title to the land. At this point in time the only

thing preventing transfer of title pursuant to the Memorandum was completion of the various recognized preconditions mentioned above.

Thereafter, the Virgin Islands enacted in 1977 the Coastal Zone Management Act. 12 V.I. §§ 901-14 (1982). To reflect a compromise concerning the application of the Act to WICO's previously existing concession rights, the Government, WICO, and certain private parties entered into a Second Addendum to Memorandum of Agreement, dated September 22, 1981. That agreement further limited WICO's rights of reclamation which, by virtue of the various agreements, were reduced from 42 acres to 15 acres. A requirement of the Second Addendum was that it be ratified and approved by the Legislature, which took place on April 7, 1982, as Act No. 4700.

On April 12, 1984, in a yearly review of the status of cases, this Court entered a dismissal of the 1968 action by the United States against WICO for lack of prosecution.

In June, 1986, WICO commenced its dredging in the Long Bay area of St. Thomas, having obtained the necessary permits. This dredging is one of the preconditions required of WICO in the Memorandum. The ensuing publicity generated energetic citizen response, which in turn generated a bill in the Legislature to repeal WICO's rights contained in Acts Nos. 3326 and 4700. This bill (16-0607) was a repudiation not only of the prior legislative ratifications of Acts Nos. 3326 and 4700, but a disavowal of the territorial government's prior approval of the Memorandum of Understanding, the First Addendum and the Second Addendum. Bill No. 16-0607 was approved by the Legislature on July 9, 1986, but vetoed by Governor Juan Luis on July 21, 1986. On August 11, 1986, the Legislature overrode the veto by the Governor and it became law as Act No. 5188.

On August 14, 1986, WICO promptly moved in this Court for a temporary restraining order and a prelim-

inary injunction against enforcement of the provisions of Act No. 5188, and other relief. On August 19, 1986, a hearing was held pursuant to this motion. At that time we enjoined by temporary restraining order, any interference with WICO's right to dredge and scheduled a hearing on the preliminary injunction for August 26, 1986.

At the August 19, 1986, hearing on a temporary restraining order, the attorney general of the Virgin Islands informed the Court that the executive branch of the government would not appear in the case, since it considered the repeal of WICO's rights to be invalid, and any appearance on its part would be simply to affirm WICO's right to the relief sought.

We then permitted the Legislature of the Virgin Islands to appear as an intervenor, along with certain officers of interested citizen groups. We rejected a motion by the intervenors to compel the executive branch to appear in the case. We noted at the time that with the grant of intervention to both the Legislature and the citizen group representatives, the interests of those favoring repeal of WICO's rights would be well represented, even without the appearance of the executive branch. This view was rewarded by the swift filing of briefs by intervenors, and by the excellence of the briefs and the oral presentations by intervenors' counsel.

To summarize, as of August, 1986, three successive elected governors, their respective attorneys general, and two separate Legislatures of the Virgin Islands have recognized WICO's right to dredge and reclaim certain defined submerged lands in the harbor of Charlotte Amalie. The various officials described above successfully negotiated limits with respect to both acreage and time as to WICO's rights, and gained important concessions in favor of the territory. The reason for this case is that the Sixteenth Legislature, now sitting, takes issue

with the validity of the actions undertaken by the territorial officials above described.

II. DISCUSSION

The elements a moving party must show for a preliminary injunction are: "a reasonable probability of eventual success in the litigation and that the movant will be irreparably injured *pendente lite* if relief is not granted." *Professional Plan Examiners of N.J. v. Lafante*, 750 F.2d 282, 288 (3d Cir.1984).

In addition to the above elements, a District Court should consider two other elements when relevant. These elements are the possibility of harm to other interested persons from the grant or denial of the injunction, and the public interest. *Professional Plan Examiners, supra* at 288. Examining these four elements, we find WICO has convincingly satisfied all four requisite elements.

A) *Reasonable Probability of Success*

WICO's strongest argument is that the Repeal Act violates the contract clause of the United States Constitution, Article I, Section 10 as contained in Section 3 of the Revised Organic Act of 1954.

The intervenors respond by challenging WICO's contract clause argument in two ways. First, they assert the transfer procedure in the 1973 Memorandum Agreement created additional conditions precedent necessary for WICO's rights, under the 1973 agreement, to mature. They refer to the federal conveyance discussed earlier and since these procedures were never followed, argue WICO lost its right to the land. Second, they claim the Repeal Act is a valid use of the Virgin Islands police power—a power which cannot be limited by contract. We take these arguments in sequence.

1) *WICO's Right to Submerged Land*

In tracing WICO's rights, we find these rights originated in the Danish grants of 1913 and were recognized and affirmed in the 1917 treaty between the United States and Denmark. In this treaty both countries intended to preserve WICO's right, in perpetuity, to obtain these submerged lands.¹⁾

The settlement to the 1968 litigation further defined WICO's rights to the submerged property. The Memorandum established specific conditions both the Virgin Islands and WICO were required to complete prior to closing on the land. Additionally, the transfer procedures were established to pass title from the United States through the Virgin Islands to WICO. These procedures state in relevant part:

6 CONVEYANCES

(a) *General.* If the requirements of the Territorial Submerged Lands Act are met, the Secretary of the Interior shall convey to the Government of the Virgin Islands, and the Government of the Virgin Islands shall convey the Filled Lands and Submerged Lands hereinafter described (and the right to reclaim the same) in Long Bay, St. Thomas Harbor, in part to WICO and in part to the Byers group.

¹ At oral argument, the attorney for the citizen intervenors stated that the "license" granted WICO in 1913 did not amount to a "fee simple" interest. The 1913 grant, however, states that "... when these land areas are reclaimed, the company will acquire free and unrestricted ownership thereof..." This certainly does provide for what we term "fee simple" ownership. In any event, it is clear that the Memorandum of Understanding and the addenda thereto were intended to provide fee simple ownership to WICO of the described lands. Finally, we note that even the complaint filed by the United States in Civ. No. 1968/337 recognized that the license granted WICO provided "... free and unrestricted exercise of property rights..."

The intervenors interpret these transfer procedures, and subsequent amendments to the Submerged Lands Act, in an unusual way. They assert these transfer procedures created additional conditions necessary for WICO's recognized preconditions, such as filling and dredging, they argue the transfer procedure had to be fulfilled prior to the 1974 amendments to the Submerged Lands Act. The reason for this concerns the title the Virgin Islands received in 1974.

The intervenors reason that prior to 1974, the United States held title to all submerged lands around the Virgin Islands, subject as we said, to WICO's rights. After the amendments to the Submerged Land Act in 1974, title to these lands reverted to the Government of the Virgin Islands to be held in trust for the people of the Virgin Islands albeit still subject to WICO's rights.² Up to this point WICO had not received title to these lands since both the recognized preconditions of the Memorandum Agreement, and the claimed preconditions from the transfer procedure, remained unfulfilled. At this point, however, intervenors argue that the Virgin Islands no longer had the ability to transfer title to WICO since it never held these lands in fee simple but as trustee for the people of the Virgin Islands. Since the Virgin Islands

² The Submerged Lands Act states in relevant part:

Subject to valid existing rights, all right, title, and interest of the United States in lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines of the territories of Guam, the Virgin Islands, and American Samoa, as heretofore or hereafter modified by accretion, erosion, and reliction, and in artificially made, filled in, or reclaimed lands which were formerly permanently or periodically covered by tidal waters, are hereby conveyed to the governments of Guam, the Virgin Islands, and American Samoa, as the case may be, to be administered in trust for the benefit of the people thereof.

did not have title it could convey, any subsequent agreement to convey title was ineffective. We disagree with this analysis.

First, we disagree with the intervenors' characterization of section 6(a) of the Memorandum Agreement. This section does not create additional preconditions. On the contrary, it merely establishes ministerial acts which had to be performed in order to properly convey title.

Second, since the transfer procedures are not preconditions but ministerial acts, we also disagree with intervenors' legal interpretation of the relationship between 1974 amendments to the Submerged Land Act and the 1973 Memorandum. Contrary to the intervenors' assessment, this relationship does not, through an unforeseen series of events, create a situation which prevents WICO from ever receiving title to these lands. Rather, this relationship simply makes moot the transfer procedures. Once the recognized preconditions are satisfied, WICO will no longer seek title through the Virgin Islands from the United States but will simply receive title direct from the Virgin Islands. In effect, the transfer of title from the United States to the Virgin Islands eliminated the need for portions of section 6(a) of the Memorandum Agreement.

Evidence for this position is contained in the First Addendum to the 1973 Memorandum Agreement. The changes made in the First Addendum to the 1973 agreement are cosmetic and required only so the 1973 Memorandum Agreement comports with the Submerged Lands Act.

Third, and of significant import, the Submerged Lands Act makes its transfer in trust "[s]ubject to valid existing rights." 48 U.S.C. § 1705(a) (Supp.1986). WICO's rights were therefore preserved and recognized in this act, notwithstanding the fiduciary nature of the transfer.

Finally, we take issue with what we perceive are the two ways the intervenors seek to assert the public trust doctrine.³ First, they claim prior elected officials did not have the authority to enter into any agreement which relinquished title to these lands, because these lands are held in trust and may never be conveyed. WICO, therefore, allegedly has no right to the property in question. Second, they seem to allege that the public trust doctrine may be cited as a legitimate public purpose for supporting the Repeal Act, to defeat WICO's Contract Clause claim. We feel compelled to address these contentions, if only because they were pressed with such force and vehemence. We note too that the same contentions permeated the legislative debate on repeal of WICO's rights.

a) *Public Trust Doctrine*

Land under tide waters has a special legal character. *State of Cal., Etc. v. United States*, 512 F.Supp. 36, 40 (N.D.Cal.1981). This special character was described by the Supreme Court in *Illinois Central R. Co. v. People of the State of Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892) as:

"a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing

³ In the transfer of submerged lands from the United States to the Virgin Islands, the statute states this land will be "administered in trust for the benefit of the people thereof." 48 U.S.C. § 1705(a) (Supp. 1986). An additional source for this authority is derived from the power the Virgin Islands Government has as sovereign over these islands. J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" 68 *Mich. L. Rev.* 471 (1970). For the early history of this doctrine in America see *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). .

therein freed from the obstruction or interference of private parties.”

Illinois Central, *supra*, 146 U.S. at 452, 13 S.Ct. at 118.

The principle described in *Illinois Central* has come to be known as the public trust doctrine.⁴

In general, the public trust doctrine recognizes that some types of natural resources are held in trust by a government for the benefit of the public. W. Rogers Jr., *Environmental Law*, *supra* at 171 n.8. Historically the doctrine applied to lands below the low-water mark in the sea and great lakes, the waters over these lands, and the waters within navigable rivers and streams. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,” 68 *Mich.L.Rev.* 471 (1970). We recognize that cases exist which support the intervenors’ proposition that in general the trustee to trust lands is prohibited from selling these areas to anyone for a private purpose. *International Paper Co. v. Mississippi St. Hwy. Dept.*, 271 So.2d 395, 399 (Miss. 1972) *cert. denied* 414 U.S. 827, 94 S.Ct. 49, 38 L.Ed.2d 61 (1973). This prohibition however, is not absolute.

b) *Situations where Courts Recognize a Private Party’s Title to Trust Lands*

In a number of situations courts have either upheld conveyances of trust lands to private interests, free of the

⁴ Prior to describing the parameters of this doctrine, we note one authority has commented that:

Any attempt at a shorthand statement of the principles of public trust must come with a disclaimer: the constitutional and legislative variations among the states approach the infinite, and many states fulfill some of the identical policy functions under different doctrinal rubrics—prescriptive rights, customs, dedication or other property theory.

W. Rogers Jr. *Environmental Law*, § 2.16 (1977). We agree with this assessment concerning the law of public trusts and concur in this disclaimer.

trust, or have recognized title in a private party to trust lands. The following situations are pertinent to the case at bar.

[1] *Improvement of Navigation or When Public Trust is not Impaired*

Submerged lands can be conveyed to the use and control of private parties for the improvement of the navigation and use of the waters or when the parcels can be disposed of without impairment of the public interest in what remains. *Appleby v. New York*, 271 U.S. 364, 394, 46 S.Ct. 569, 578, 70 L.Ed. 992 (1926) (Supreme Court recognized title, free of the trust, in private persons to filled trust lands); *Illinois Central R. Co.*, *supra* 146 U.S. at 453, 13 S.Ct. at 118. At least one state has held that in the proper administration of the trust, they may find it necessary to cut off certain tidelands from water access and render them useless for trust purposes. In these cases the State Legislature has the power to make this determination and free the lands from the trust. When such lands have been so freed, they may be irrevocably conveyed into absolute private ownership. *City of Long Beach v. Mansell*, 3 Cal.3d 462, 91 Cal.Rptr. 23, 36-38, 476 P.2d 423, 437-38 (1970) (in bank) (describing common law trust doctrine as opposed to the California Constitutional prohibitions against alienation of these lands).⁵

[2] *Settlement of Land Disputes*

The second instance involves settlement of land disputes. When title and boundaries to certain submerged and reclaimed trust lands are in dispute, a settlement between the local government and landowners will be enforced and will not be set aside based on an assertion that the settlement violates the public trust doctrine.

⁵ For examples of other states which include versions of the public trust doctrine in their respective constitutions see the state constitutions of Pennsylvania and Wisconsin.

City of Long Beach, supra. Groups not party to the original settlement will also be prevented from raising the doctrine to challenge titles granted pursuant to the settlement. *Amigos De Bolsa Chica v. Signal Properties*, 142 Cal.App.3d 166, 190 Cal.Rptr. 798 (1983).

[3] *International Duty*

Governments may recognize title in private individuals to trust property pursuant to an international duty, even though the original alienation of submerged lands may conflict with the public use doctrine. *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 206-207 n. 4, 104 S.Ct. 1751, 1756 n. 4, 80 L.Ed.2d 237 (reh'g den.), 467 U.S. 1231, 104 S.Ct. 2693, 81 L.Ed.2d 886 (1984); *Montana v. United States*, 450 U.S. 544, 552, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (reh'g den.), 452 U.S. 911, 101 S. Ct. 3042, 69 L.Ed.2d 414 (1981).

The facts in *Summa, supra*, are remarkably similar to those before us. The petitioners' title to the land in question dated back to 1839 when the Mexican Governor of California granted title to the property to the petitioners' successors in interest. This property became part of the United States following the war between the United States and Mexico which was formally ended by the Treaty of Guadalupe Hidalgo in 1848. Under the terms of this treaty the United States undertook to protect the property rights of Mexican landowners. To both fulfill its obligations under the treaty and to provide for an orderly settlement of land claims, Congress passed the Act of March 3, 1951, setting up a comprehensive claims settlement procedure.

The successors in interest followed the procedures provided in the Act and eventually the Secretary of Interior approved their claim and issued them a patent confirming their title. The Supreme Court noted as significant the fact that no mention of any public trust was made

in the patent and that California did not assert this interest during the confirmation hearings.

The precise issue before the Court was whether

“a property interest [public trust easement] so substantially in derogation of the fee interest patented to petitioner’s predecessors can survive the patent proceedings conducted pursuant to the statute implementing the Treaty of Guadalupe Hidalgo.”

Summa, supra, 466 U.S. at 205, 104 S.Ct. at 1755.

In holding it could not, the Court stated:

“Patents confirmed under the authority of the 1851 Act were issued pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State.”

Summa, supra at 205, 104 S.Ct. at 1756.

As we hope is by now obvious, the Supreme Court has approved recognition, by a government, of title in private hands to trust lands. WICO’s original rights, like the original grants in *Summa*, occurred under the auspices of a foreign government and were subsequently recognized in a treaty with the United States. Both treaties predated that point in time when California and the Virgin Islands had control over the respective tidelands. The grants, therefore, occurred prior to the existence of the public trust doctrine. Pursuant to the international agreements, they should be upheld in the face of a challenge based on this doctrine.

The challenge to the 1973 settlement, like the challenges to the settlements in *City of Long Beach, supra*, and *Amigos, supra*, must also be rejected. As in those cases, in 1973 the United States, the Virgin Islands, and WICO were in contention over the extent and validity of WICO’s right to reclaim 42 acres of land. The com-

promise at that time benefited both sides because it clearly acknowledged and defined WICO's rights to reduced portions of the submerged land. It is impermissible for the Sixteenth Legislature to extinguish WICO's rights under the settlement, arguing that prior public officials had no such authority to act. As we have seen, the highest court in the land has found similar acts reasonable and allowable.

Finally, we find that there is no impairment of the public trust in the reclamation and development such as proposed by WICO. See, e.g., *Appleby, supra*. In an analogous case, *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927), the Wisconsin Supreme Court citing to *Illinois Central, supra*, reiterated the proposition that title to submerged lands could be conveyed to private interests for reclamation when the lands could be disposed of without detriment to the public interest in the lands and waters remaining. *City of Milwaukee, supra* 214 N.W. at 832.

The Wisconsin Legislature granted submerged lands in Milwaukee's harbor to a steel company. The steel company intended to fill these submerged lands and construct docks and wharfs thereby creating employment and economic development.⁶ The issue before the Wisconsin court was whether the State of Wisconsin, as a sovereign state of the Union, had the power to cede to Milwaukee, which in turn conveyed to the steel company, property held in trust free of the trust. *City of Milwaukee, supra* at 821. In holding that Wisconsin could do so, the court made a number of points relevant to WICO's situation.

Initially, the court recognized that normally these lands could not be conveyed to a private person. *Id.* at 830. The court then reviewed a number of circumstances

⁶ In the record before us, WICO plans to construct docks off its reclaimed lands for a marina, among other uses.

in which such conveyances are permitted. First, these lands would not damage any rights of other riparian owners or the public. *Id.* at 829. Second, the court deferred to the Legislative enactment and “presumed the Legislature had made an investigation of the entire situation” and concluded that other riparian owners or the public would not be harmed but, on the contrary, would benefit from the grant. *Id.* at 829. Third, the court reconciled the conveyance by stating it did not violate the public trust doctrine but actually promoted it. *Id.* at 830.⁷ Finally, the court noted that the steel company, though “a private corporation operated for profit, . . . nevertheless is an important factor in the industrial life of the city and state”. *Id.* at 830. All of these factors are relevant to our case.

The 7.5 acres to be reclaimed by WICO fronts land not used for marine purposes but as a housing project and park. The owners of this land are not utilizing their riparian rights in any way. There is no public beach or other particular form of public access—the original waterfront is simply unused shoreline.

The Virgin Islands Legislature, in Act No. 3326, had before it exhaustive studies of the issue and determined the present compromise was in the best interest of the Virgin Islands people. The intervenors consistently ignore how the 1973 compromise with WICO was in furtherance of the public interest. This is described in the Memorandum, to which Governor Evans affixed his signature and the seal of his office, the provisions of which the legislature sitting at the time ratified. We do well to recall the provisions.

⁷ The Wisconsin Court implied that if the Legislature had not allowed the conveyance, this failure would have amounted to “gross negligence and a misconception of [the Legislature’s] proper duties and obligations”. *Id.* 214 N.W. at 830.

For the people of the Virgin Islands, the conveyances to be made "satisfy a compelling public need" in the following respects:

- (1) An additional 2½ acres will be added by WICO to the public recreation area near Pearson Garden, thus doubling its size;
- (2) Filled land for the waterfront highway to permit widening from two to four lanes will be provided by WICO.
- (3) Dredging the harbor in Long Bay will be provided by WICO, thereby benefiting navigation and promoting tourism;
- (4) The reclamation will enlarge the area of level land for development near the downtown area of Charlotte Amalie now limited because of the hilly terrain;
- (5) The development contemplated on the reclaimed lands for marinas, cruise ship berths, officers and other like facilities will provide additional employment for residents of St. Thomas and enhance tourism facilities;
- (6) Termination of the remaining WICO rights under the Danish grant will eliminate a possible cloud over the future of St. Thomas harbor, enabling St. Thomas harbor to be developed on a limited, planned basis, subject to specific time limits.

Memorandum at pp. 7-8.

We find, accordingly, that there is ample precedent and authority for the actions taken by territorial officials in entering into the Memorandum and subsequent addenda, even under the public trust doctrine. For that further reason, WICO's rights should not be impaired.

2) *Police Power v. Contract Clause*

The parties, by asserting the Contract Clause and state police power for support of their respective positions, have placed a constitutional dilemma squarely before us. This dilemma involves the tension between constitutional protections offered to contracts, and the sovereign power to protect the health and welfare of the people.⁸ This tension involves, on the one hand, a sovereign's unfettered power to protect the welfare of its people encountering the constitutional protections against state action found in the impairment clause. When a sovereign's action, which impairs contract rights, is allegedly motivated by a legitimate public purpose, this tension comes to a head.

Without question, it is settled law that states may pass statutes for the promotion of the commonwealth or for the good of the public, though they may impair the obligation of contracts. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, 98 S.Ct. 2716, 2720, 57 L.Ed.2d 727 (reh'g den.), 439 U.S. 886, 99 S.Ct. 233, 58 L.Ed.2d 201 (1978). This reserved power "is an exercise of the sovereign right of a Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under con-

⁸ Police powers generally are those powers of sovereignty not given to the Federal Government exclusively by the United States Constitution, nor prohibited by that document to the states, nor reserved to the people. 2 C. Antieau, *Modern Constitutional Law*, § 10:1 (1969). The Supreme Court has described this power in *Parker v. Brown*, 317 U.S. 341, 359-60, 63 S.Ct. 307, 317-18, 87 L.Ed. 315 (1943) as follows:

The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers.

Congress included police powers in its grant of power to the Virgin Islands in the Revised Organic Act. Rev.Organ.Act of 1954 § 3 (1967).

tract between individuals" *Allied, supra* at 241, 98 S.Ct. at 2721, citing *Manigault v. Springs*, 199 U.S. 473, 480, 26 S.Ct. 127, 130, 50 L.Ed. 274 (1905).

Juxtaposed against this sovereign power is the Contract Clause which unequivocally states:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

U.S. Const., Art. I § 10.⁹ As can be seen, a tautological deadlock could easily ensue if a contract is impaired by a statute that has a claimed public purpose. Resolution of this deadlock is required because, as noted by the Supreme Court, "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some*¹⁰ limits upon the power of a State to abridge existing contractual relationships even in the exercise of its otherwise legitimate police power." *Allied, supra* at 438 U.S. at 242, 98 S.Ct. at 2721. The *Allied* Court looked to five of its prior opinions to help define these limits. A brief review of these cases is warranted to determine the parameters of this conflict.

In *Home Building & Loan Asso. v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed 413 (1934) the Court upheld Minnesota's police power against Contract Clause attack. There a mortgage moratorium statute was enacted to provide relief for homeowners threatened with foreclosure. This law conflicted with a lender's contractual foreclosure rights. The Court, however, acknowledged that despite the Contract Clause, States retain residual authority to safeguard the vital interests of their people. *Allied, supra* 438 U.S. at 242, 98 S.Ct. at 2721; *Blaisdell, supra* 290 U.S. at 434, 54 S.Ct. at 238. Five factors were significant in upholding this law.

⁹ This prohibition is also included in the Revised Organic Act. Rev.Organ.Act of 1954 § 3 (1967).

¹⁰ Emphasis in the original.

First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. Second, the state law was enacted to protect a basic societal interest, not a favored group. Third, the relief was appropriately tailored to the emergency that it was designed to meet. Fourth, the imposed conditions were reasonable. And, finally, the legislation was limited to the duration of the emergency.

Blaisdell, supra at 444-47, 54 S.Ct. at 242-43.

It is implied in the *Blaisdell* opinion that if the moratorium legislation had not possessed the characteristics attributed to it by the Court, it would have been invalid under the Contract Clause.

In three subsequent cases, the Supreme Court honed its jurisprudence concerning contract clause limitations of a state's police power. In *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344 (1934), the Court held invalid under the Contract Clause an Arkansas law that exempted the proceeds of a life insurance policy from collection by the beneficiaries. The Court stressed that the statute was not precisely and reasonably designed to meet a grave temporary emergency in the interest of the general welfare.

In *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60, 55 S.Ct. 555, 556, 79 L.Ed 1298 (1935), the Court held invalid under the Contract Clause another Arkansas law stating "[e]ven when the public welfare is invoked as an excuse," . . . the security of a mortgage cannot be cut down 'without moderation or reason or in a spirit of oppression.'" *Allied, supra* 438 U.S. at 243, 98 S.Ct. at 2722; *Kavanaugh, supra*, 295 U.S. at 60, 55 S.Ct. at 557.¹¹

¹¹ Similarly, in *Treigle v. Acme Homestead Assn.*, 297 U.S. 189, 196, 56 S.Ct. 408, 410, 80 L.Ed. 575 (1936), the court, in holding a

Finally, in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977), the Court held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause. *Id.* at 22, 97 S.Ct. at 1517. In its analysis the Court recognized a number of principles helpful to us. The Court again recognized that although the absolute language of the clause must leave room for the state's police power, that power has limits when its exercise effects substantial modifications of private contracts. *Allied Steel, supra* 438 U.S. at 244, 98 S.Ct. at 2722, *United States Trust, supra* 431 U.S. at 21, 97 S.Ct. at 1517.

Additionally, the Court recognized that despite the customary deference courts give to state laws directed to social and economic problems, legislation adjusting contract rights must be reasonable and of a character appropriate to the public purpose justifying its adoption. *Allied, supra* 438 U.S. at 244, 98 S.Ct. at 2722; *United States Trust, supra* 431 U.S. at 22, 97 S.Ct. at 1517. With these parameters in mind, we turn to examine WICO's Contract Clause claim.

a) *Substantial Impairment*

The threshold inquiry for Contract Clause issues is whether the statute has substantially impaired a contractual relationship. *Allied, supra* 438 U.S. at 244, 98 S.Ct. at 2722; *Keystone Bituminous Coal Assn. v. Duncan*, 771 F.2d 707, 717 (3d Cir.1985). In general a statute is considered a contract when "the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the state." *United States Trust, supra* 431 U.S. at 17 n. 14 & 19-20 n. 17,

Louisiana law invalid under the Contract Clause stated, "[s]uch an interference with the right of a contract cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated. . . ."

97 S.Ct. at 1515 n. 14 & 1516 n. 17. Here, the original settlement is clearly a contract and, following the above stated principle, the legislative ratification of the Memorandum is also considered a contract. That this contract has been impaired is a misnomer—it has been entirely eliminated.

By repealing both Acts Nos. 3326 and 4700, the Legislature repudiated prior approval of the Memorandum and Addenda, and cancelled the authority of the governor to enter into the agreements. This has the further effect of repudiating the agreement and WICO's rights recognized therein by the Government of the Virgin Islands.

The Repeal Act also places WICO on the same footing as any other entity in seeking development and occupancy of submerged lands, giving WICO no greater rights than provided in the Coastal Zone Management Act. Thus, the seal of the Legislature is put on a repudiation of WICO's original grant from the Government of Denmark, and the recognition of that grant by the Government of the United States. It is difficult to contemplate how the legislative elimination of WICO's rights could be more comprehensive.

The first step, therefore, is satisfied.

b) *Significant and Legitimate Public Purpose*

That WICO's rights have been completely eliminated is significant in our next inquiry. We must determine whether there is a significant and legitimate public purpose behind the law such as remedying broad and general social or economic problems. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983); *Keystone, supra* at 717, *Troy Ltd. v. Renna*, 727 F.2d 287, 297 (3d Cir.1984). The government has a difficult burden to overcome at this second stage because "[t]he severity of the impairment measures the height of the hurdle the [territorial] legislation must clear." *Allied Steel,*

supra 438 U.S. at 245, 98 S.Ct. at 2722. Minor alterations of contract rights may end the inquiry after the first stage while severe impairments "push the inquiry to a careful examination of the nature and purpose of the [territorial] legislation." *Id.* at 245, 98 S.Ct. at 2723. Since the Legislature has completely eliminated WICO's rights, we must carefully scrutinize the nature and purpose of the legislation.

Initially we note the existence of an important public interest alone is not always sufficient to overcome the Contract Clause limitation on legislative authority. *United States Trust*, *supra* 431 U.S. at 21, 97 S.Ct. at 1517. Without doubt, protection of our islands' submerged lands is an important public interest which the Legislature, through use of its police power, could protect by invoking the public use doctrine. That this is a legitimate public use sufficient to overcome WICO's contract rights is an entirely different matter.

As stated in our prior analysis, WICO's development may in fact serve a greater public purpose than leaving the submerged lands inviolate. At least, this has been the assessment of every elected governor of the Virgin Islands, and two elected legislatures. As stated earlier, this development fits within those situations approved by the Supreme Court, so it cannot be said that prior legislatures had no authority to make the agreements they adopted.¹² Additionally, the Repeal Act did not address

¹² The intervenors assert correctly that one legislature can neither abridge the powers of a succeeding legislature nor bargain away the police power of the state. *United States Trust Co.*, *supra* 431 U.S. at 23, 97 S.Ct. at 1518. The Memorandum as amended, however, does not limit the government's ability to gain title to the filled lands. It specifically recognizes the right to exercise eminent domain. The action in repealing WICO's rights could be considered a "taking" of private property without just compensation in violation of the Revised Organic Act. Rev. Organ. Act of 1954 § 3 (1967). This is an alternative claim made by WICO in this law suit, but since we find the repeal invalid, we do not reach this point.

any broad and general social or economic problem. Rather, it can be argued, the Repeal Act exacerbates various existing problems.

Since the statute is solely directed at WICO, it can not be characterized as addressing a broad and general societal interest.¹³ As the Supreme Court cautions, a law directed against a specific entity "can hardly be characterized . . . as one to protect a broad societal interest. . . ." *Allied, supra* 438 U.S. at 249, 98 S.Ct. at 2724.

The Repeal Act also fails to remedy an economic problem. Rather, it contributes to the present economic distress in the islands by stifling development which would create new employment.¹⁴

Finally, unlike the situation in *Blaisdell*, where the Supreme Court upheld Minnesota's police power in the face of a Contract Clause attack, there is no emergency situation, similar to the Great Depression, here in the islands which the Repeal Act intends to address. Additionally, even assuming an emergency existed which the Repeal Act addressed, the act would still fail to pass constitutional scrutiny because the act is not limited to the duration of the emergency but purports to eliminate WICO's rights forever. *Blaisdell, supra* 290 U.S. at 434, 54 S.Ct. at 238.

3) *Adjustment of Rights*

Once a legitimate public purpose has been identified, the court must determine whether the adjustment of the

¹³ Indeed, as we will discuss later, if the repeal is valid, it will not have closed the door entirely on WICO, but conceivably will serve to reinstate all the rights WICO enjoyed under the treaty, thereby increasing the submerged lands subject to WICO's control, a result hardly intended by the Legislature.

¹⁴ WICO intends to develop the land in question by building a hotel and marina. The Memorandum of Understanding in its preamble, (pp. 7-8) recites the economic benefits the government expects to reap by selling WICO's claim.

parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the legislations public purpose. *United States Trust, supra* 431 U.S. at 22, 97 S.Ct. at 1517. *Keystone, supra* at 717. For this third inquiry courts should defer to the legislative judgment as to the reasonableness of the particular measure if the state itself is not a contracting party. *United States Trust, supra* at 431 U.S. 22-23, 97 S.Ct. at 1517-18; *Keystone, supra* at 717. If the state is a contracting party, however, the court need not defer to the legislative judgment but is free to determine whether a less drastic modification would be sufficient. *United States Trust, supra* 431 U.S. at 30-32, 97 S.Ct. at 1521-23; *Keystone, supra* at 717; *Troy, supra* at 296. In WICO's case, of course, the government is a contracting party.

The repudiation of WICO's rights in the submerged land is neither based upon reasonable conditions nor of a character appropriate to the Legislature's public purpose. By repealing the prior settlement, the Government in effect no longer recognizes WICO's right to title in the submerged lands. This adjustment is drastic and has no reasonable basis. WICO intends to develop the new land into a marina-hotel complex. We note that tourism is a major industry in the Virgin Islands and one of the express goals of Acts Nos. 3326 and 4700, as well as other legislation, is to promote and assure priority for coastal-dependent economic development, such as hotels and marine facilities. *See also* 12 V.I.C. § 903(b) (3) (1982). Hotel and marine facilities are a common use for coastal zone areas. By extinguishing WICO's rights, the Legislature acted unreasonably. Its position finds no support in any hypothetical public policy, but it violates the stated public policy of an act intended to address the issues of coastal protection and development.

B) *Irreparable Harm*

WICO has demonstrated it will be irreparably harmed should it be unable to continue dredging operations.

1) *Constitutional Violation*

Interference with constitutional rights is considered irreparable injury. *Planned Parenthood v. Citizens For Com. Action*, 558 F.2d 861, 867 (8th Cir.1977); *Henry v. Greenville Airport Commission*, 284 F.2d 631, 633 (4th Cir.1960). The interference with WICO's contractual rights in violation of the Contract Clause, standing alone, is sufficient irreparable harm to support the result we reach.

2) *Economic Loss*

The possibility of significant economic losses, in addition to the constitutional interference, strengthens WICO's argument that it will be irreparably harmed. Normally, a defendant's ability to compensate a plaintiff with money damages precludes the issuance of a preliminary injunction. *Nuclear-Chicago Corp. v. Nuclear Data Inc.*, 465 F.2d 428, 430 (7th Cir.1972). A court may, however, look to the financial strength of a defendant to determine whether or not a defendant could compensate the petitioner with money damages. *Eli Lilly & Co. v. Premo Pharmaceutical Labs*, 630 F.2d 120, 137 (3d Cir.), *cert. denied*, 449 U.S. 1014, 101 S.Ct. 573, 66 L.Ed.2d 473 (1980).

We have no difficulty taking judicial notice that the Virgin Islands government is in difficult financial straits. We have had numerous cases in front of us in which persons with legitimate claims against the government in the multiple millions of dollars have been unable to obtain funds owing them. In each instance, government attorneys have cited the lack of funds with which to pay, and the debts remain unpaid to this day. Included among the claims are those which would have the highest

priority, i.e., payments to employees of the government owing for several years. In addition, even if the funds were available, the government could refuse to make payment. Being exempt from levy and execution, it could not be forced to alter such a posture.

Additionally, WICO has already paid more than half a million dollars on a dredging contract. More than 60,000 tons of fill are in place and at risk of being washed away should a serious storm arise. There is no question WICO would suffer irreparable harm even without the constitutional violation.¹⁵

C. *Other Relevant Elements*

We have covered thus far the two central elements necessary for a preliminary injunction under the holding of *Professional Plan*, *supra*. They are the reasonable probability of eventual success in the litigation, and that the movant will be irreparably harmed if relief is not granted. As our discussion began, we noted that *Professional Plan* contemplated two additional elements when relevant. These are the possibility of harm to other interested persons from the grant or denial of the injunction, and the public interest.

We take these two elements together because they are intertwined. The citizen intervenors have cited no direct possibility of harm to themselves or others in the community, apart from the public interest which they seek to protect. Our disagreement is whether the public interest is served or harmed by permitting the continued

¹⁵ At this time the reclaiming work is not complete. A dredge fill dike has been erected on the seaward side. Behind this is a settling pond where the 60,000 tons of dredge spoil have been deposited. Placement of rock armor has commenced but is incomplete. The rock armor is designed to protect the reclaimed land from erosion from the ocean. Should a storm hit St. Thomas prior to completion of the rock armor, there is a risk of the reclaimed land being washed away.

reclamation of land by WICO for the purposes contained in the agreements.

The public interest sought to be implemented in the Memorandum in favor of the people of the Virgin Islands is substantial. We described the benefits to be gained by the government and its citizens outlined in the Memorandum and will not repeat them here. To permit WICO to assert its rights pursuant to the Memorandum and Addenda serves the public interest. To adopt the intervenors' arguments in favor of halting the dredging and upholding the repeal of WICO's rights, would invite chaos.

We refer to a point touched on several times earlier in this opinion. If the repeal is permitted, as we view the law it would not, as an end result, eliminate WICO's rights in Charlotte Amalie harbor. Rather, it would expand then [sic] back to the original rights contained in the concession from the Government of Denmark in 1913. These rights have been forcefully recognized by the signatories to the 1917 Treaty, i.e., Denmark and the United States. They include nearly triple the reclamation potential contained in the Memorandum and Addenda, and the use of the reclaimed land would not be subject to the restrictions contained in the Memorandum.

The public interest would not be served by the possibility of a return to such a situation. For this reason, we find that the granting of a preliminary injunction, permitting WICO to exercise the limited rights agreed to in the Memorandum, would better serve the government and people of the Virgin Islands than the spectre of reinstatement of the vastly enlarged rights contained in the 1913 concession.

III. CONCLUSION

We find that WICO has satisfied all of the conditions necessary for a preliminary injunction. In reaching that conclusion, we have covered the legal bases a court must consider when confronting the issues presented herein. But we cannot close without addressing the matter from a larger perspective than the nuts and bolts of *stare decisis*. We speak of questions of honor and the integrity of one's promises. They apply with no less force to government than to others. In this instance, the only three elected governors the territory has ever had and their respected attorneys general, acting with the men and women elected to two separate legislatures, bound themselves and the government to promises solemnly given. If what they did in good faith and in pursuit of their vision of the public interest is to be lightly discarded many years later, we ask: who would without trembling and consternation, deal with such a government in the future? And who, ultimately would be the loser? The question answers itself. The people of the Virgin Islands would suffer the loss of their government's promises are considered as will-o-the-wisp, to be kept when convenient, and broken as desired.

We acknowledge that the citizen intervenors' views are honestly come by and sincerely held. Their promotion of the public interest as they view it cannot be deprecated. We only regret that on the issues in this case, our own view of that public interest diverges from theirs.

All persons interested in this controversy would do well to read *United States v. 119.67 Acres of Land*, 663 F.2d 1328 (5th Cir.1981). This case was cited at oral argument and persuasively supports our decision. Under a subsection entitled "Binding the Government to its Word," there appear the following words:

The Government does not deny the words, or even the agreement, which it, together with its adver-

saries, importuned the District Court to approve. On the contrary, acknowledging in the best Boy Scout tradition the words spoken, the agreements made, and the consensual judgment entered, the Government, now claiming to be adorned with the protective armor against which neither equities nor accepted morality may penetrate, takes the simple, but awesome position that what it agreed to was of no moment because it was *mistaken*¹⁶ on the operative facts.

119.67 Acres, at § 333.

Our attitude is similar to that of the Fifth Circuit in discussing promises made by the United States. The Legislature of the Virgin Islands should not be permitted to ignore its word of honor pledged in the agreements with WICO, carrying the entire Government of the Virgin Islands along with it.

A preliminary injunction will issue enjoining interference with WICO's rights under the Memorandum of Understanding and Addenda thereto.

¹⁶ Emphasis in the original.

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 337-1968

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE WEST INDIAN COMPANY LIMITED, also known as
DET VESTINDISKI KOMPAGNI; JOSEPH BYERS II; MAJOR
BYERS INVESTMENT ASSOCIATES; FORD WRIGHT, JR.;
ADRIAN PEREZ-AGUDO; ALBERT B. POE; JORGE SOUSS;
JOSE BLANCO LUGO; ISLAND HOTELS, LTD.;
Defendants.

ACTION TO QUIET TITLE

COMPLAINT

The United States of America, by Almeric L. Christian, United States Attorney, acting by and upon the direction of the Attorney General of the United States, complains of the defendants and alleges:

I

This is a civil action brought by the United States of America, and the jurisdiction of the Court is based upon 28 U.S.C. sec. 1345 and 48 U.S.C. sec. 1612.

II

Certain real property which is the subject of this action is located in St. Thomas, Virgin Islands.

III

By communications of January 18, 1913 and April 16, 1913, from the Danish Ministry of Finance, the West Indian Company, Ltd., also known as Det vestindiski Kompagni, was granted a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor. The license provided that, under certain circumstances, when land areas are reclaimed, the Company shall have free and unrestricted exercise of property rights over them.

IV

The West Indian Company, Ltd. (hereafter referred to as Company) did a limited amount of dredging, filling and improvement in the area covered by the license in 1913 or 1914. The shoreline in the area covered by the license after completion of this work is shown by a map, U.S. Coast and Geodetic Survey Register No. T-3771.

V

The Company has not filled in any land so as to add land to the shoreline in the area covered by the license since 1914.

VI

The United States in accepting a cession of the Virgin Islands from Denmark in 1917 recognized the license granted to the Company. See 39 Stat. 1706 (1915-1917).

VII

In 1935 the U. S. Army Corps of Engineers added fill land to the 1918 shoreline as a part of Federal Project No. 70, which project on completion reclaimed certain swampland and made the harbor of St. Thomas more navigable. In the area covered by the license to the Company, this fill extended the shoreline and increased the land area of that part of St. Thomas Harbor; as noted below Lot. Nos. 4 and 5, Estate Thomas, King's Quarter,

Virgin Islands, have subsequently been treated as including this fill land.

VIII

The Corps of Engineers prepared a map identified as St. Thomas, V. I., Long Bay and Vicinity, Swamp Reclamation, Federal Project No. 70, dated June 17, 1935, that showed the shoreline as it existed in the area covered by the Company's 1913 license prior to the start of Federal Project No. 70. Hereafter this map is referred to as Pre-Government Fill Shoreline Map.

IX

By warranty deed dated August 18, 1956, the Company conveyed to Major Byers Investment Associates certain uplands (identified as Lot No. 4, Estate Thomas, King's Quarter, St. Thomas, Virgin Islands) bordering on the harbor area covered by the 1913 license. Included within the description of lands conveyed are fill lands created by the Corps of Engineers in connection with Federal Project No. 70.

X

By warranty deed dated September 11, 1956, the Company conveyed to Joseph Byers II certain uplands (identified as Lot No. 5 Estate Thomas, King's Quarter, St. Thomas, Virgin Islands) bordering on the harbor area covered by the 1913 license. Included within the description of lands conveyed are fill lands created by the Corps of Engineers in connection with Federal Project No. 70.

XI

By warranty deed dated February 15, 1961, Joseph Byers II and Ethel F. Byers, husband and wife, conveyed to the Government of the Virgin Islands certain uplands (identified as Lot No. 5A Estate Thomas, King's Quarter, St. Thomas, Virgin Islands) which were included in the deed of September 11, 1956, mentioned in paragraph 10 above.

XII

By deed dated April 9, 1965, Joseph Byers II conveyed to Major Byers Investment Associates all of his right, title and interest in certain uplands (identified as Lot 5 Estate Thomas, St. Thomas, Virgin Islands) which were included in the deed of September 11, 1956, mentioned in paragraph 10 above.

XIII

By warranty deed dated October 19, 1966, Major Byers Investment Associates conveyed to Ford Wright, Jr., Adrian Perez-Agudo, and Albert B. Poe certain uplands (identified as Parcel No. 5 Estate Thomas, King's Quarter, St. Thomas, Virgin Islands) bordering on the harbor area covered by the 1913 license. Included within the description of the lands conveyed are fill lands created by the Corps of Engineers in connection with Federal Project No. 70, and fill lands created by the Government of the Virgin Island in the 1964 period. The grantees of this deed subsequently sold to Jorge Souss and Jose Blanco Lugo a one-fourth share and undivided interest in this same parcel of land.

XIV

The United States alleges that all fill land seaward of the shoreline shown in the Pre-Government Fill Shoreline Map, including that filled by the Government of the Virgin Islands in the 1964 period, is owned by the United States, and that the license granted to the Company in 1913 terminated prior to July 11, 1933, when the Governor of the Virgin Islands noted in a memorandum to the Assistant Secretary of the Interior that the harbor had not been dredged for more than 20 years. Provided, however, that this allegation only relates to the harbor area covered by the 1913 license.

WHEREFORE, plaintiff prays:

1. That it be adjudged that the defendants' claims to the filled lands seaward of the shoreline shown by the Pre-Government Fill Shoreline Map, within the area covered by the 1913 license, are invalid, and that the plaintiff is the owner of said lands and is entitled to the quiet enjoyment and peaceable possession thereof.

2. For plaintiff's costs herein and for such other and further relief as the Court deems proper.

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
United States Attorney

/s/ David W. Miller
DAVID W. MILLER
Attorney, Department of Justice
Washington, D. C. 20530
Attorneys for the Plaintiff.

DISTRICT COURT OF THE VIRGIN ISLANDS
OF THE UNITED STATES

September 19, 1972

Governor Melvin Evans
Government House
Charlotte Amalie, St. Thomas

Dear Governor Evans:

As you know, the United States Government is currently litigating a case against the West Indian Company in this court. The pretrial conferences have been held and the case is scheduled for trial next month. The purpose of the suit is to quiet title to certain waterfront lands which lie within the original concession area granted to WICO and guaranteed by the 1917 treaty with Denmark. The Government has, however, raised a number of contentions tending to show that the concession has terminated.

I am writing to suggest that a compromise settlement may be desirable. Although the Virgin Islands is not formally a party to this action, it would be a principal beneficiary of any Government victory. I therefore suspect that if your views were conveyed to the Secretary of the Interior they could substantially affect the conduct of this litigation. I suggest the compromise for two reasons. First, WICO's settlement offer, presented at public hearings last October 26th, appears generous and would seem to give the Government all that it is seeking in the suit. Secondly, I am inclined to believe that WICO will prevail on the merits if this case is carried forward to trial. I am enclosing a flow sheet showing the major issues involved, with the darker line indicating how I believe they may be resolved.

I must emphasize, of course, that this is only a preliminary evaluation. I have not yet considered this case in detail. More particularly, I have not heard the argu-

ments of counsel or received specialized evidence on Danish law. In consequence my opinion here cannot be considered binding, and I might well have occasion to revise it at trial.

I might, however, comment on one apparent obstacle to settlement. WICO proposes to quitclaim to the Government those tracts on which the Government now has a claim, plus some others, but would retain the right to create fill lands in the harbor at the base of Bluebeard's Castle. The proposal is illustrated on the enclosed map. It might be that the Government is most concerned about WICO's last reservation, since construction there might be considered by some to have a detrimental effect on the beauty of the waterfront. Some compromise has since been effected on this point, but the two parties might give additional attention to these aesthetics in any further negotiations.

I am sending copies of this letter to members of the legislature with whom your decision might be shared, and to all interested counsel.

In conclusion I should emphasize that the outcome of this case remains sufficiently uncertain to make the further exploration of compromise settlement seem a worthwhile undertaking for all concerned. Trial will begin on October 10th; but even after lengthy litigation here, the lands at stake are so valuable that the unsuccessful party may well be motivated to take an appeal. This would deny a workably clear title to anyone for several more years, which seem regrettable in as rapidly growing an area as St. Thomas.

Very truly yours,

/s/ Warren H. Young
WARREN H. YOUNG

WHY:jve

cc: W.W. Bailey, Esq.
Thomas D. Ireland, Esq.
Sanford C. Miller, Esq.
David W. Miller, Esq.
Senator Earl B. Ottley
Senator Athniel C. Ottley
Senator Felix A. Francis
Senator Jaime Garciaz
Senator John L. Maduro
Senator Claude A. Molloy
Senator Alexander A. Moorhead, Jr.
Senator David A. Puritz
Senator Percival H. Reese
Senator Elroy A. Sprauve
Senator Philip C. Clark
Senator Hector L. Cintron
Senator George G. O'Reilly, Jr.
Senator Ariel A. Melchior, Jr.
Senator Virnin C. Brown

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Civil No. 337/1968

UNITED STATES OF AMERICA,
Plaintiff

-vs-

WEST INDIAN COMPANY, LTD.,
Defendant

ORDER

A Memorandum of Understanding, dated October 3, 1973, and signed by all the parties to the above litigation, has been brought to the Court's attention.

WHEREAS, the above Memorandum obligates the West Indian Company, Ltd. to make certain landfills in St. Thomas harbor, which landfills may require a year and a half or more; and

WHEREAS, disagreements may arise as to the satisfactory performance of the above conditions, or of other conditions included in the Memorandum,

It is hereby ORDERED:

1. That the cause be continued *sine die* until in the Court's judgment the affirmative obligations of the parties under the Agreement are performed; and

2. That all parties report to the Court at 90 day intervals as to the progress of the performance of conditions, the first report to be submitted March 1, 1974.

Dated at Christiansted, St. Croix,
this 27th day of December, 1973.

ENTER:

/s/ Warren H. Young
WARREN H. YOUNG
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Civil Action No. 87-3369

WEST INDIAN CO.

v

GOVERNMENT OF THE VIRGIN ISLANDS

December 7, 1987

CORAM: GIBBONS, STAPLETON AND MANSMANN

* * * *

[38] THE COURT: In any event, there is no statute that anybody has referred to which provides for indemnification of private attorneys general (unintelligible).

MR. BAKER: No, the statutes—the code does not provide as I have read it. For the executive branch of the government or any part thereof to indemnify persons who wish to act as applied in this manner. I think that the claims—the arguments of the government are well set forth in the brief and I don't think that—unless you have any other questions, I don't think it's necessary to articulate them.

THE COURT: Thank you. Is there some time reserved for rebuttal?

MS. HOLLAR: May it please the court, my name is Brenda Hollar and I represent Helen W. Gjessing and Save the Long Bay Coalition. [39] And I will respond to partial rebuttal to arguments that have been raised by appellees.

First of all, I would like to state that our position is that the settlement agreements, all of the settlement agreements are invalid because they tend to modify treaty rights and it is our position—I don't believe that we have cited it within our brief but we do rely on section eight of the Revised Organic Act of 1954 and that's section 8-A which precludes or [sic] the legislature from in any way modifying or impairing treaty rights and in that regard it is our position that all of the settlement agreements had that particular objective and, therefore, any acts by the legislature were ultra vires and totally in violation of the Revised Organic Act as enacted by Congress.

THE COURT: Wouldn't the consequence of that be then that WICO can rely on the treaty all alone?

MS. HOLLAR: Yes, Your Honor. We have to come to grips with that, that at this point—

[40] THE COURT: If we wipe out the settlement—

MS. HOLLAR: Yes, Your Honor, correct.

THE COURT: The result may well be that WICO has more rights.

MS. HOLLAR: I'm sorry?

THE COURT: If we wipe out the settlement, the result may be that WICO has more rights.

MS. HOLLAR: Well, Your Honor, it's our position—

THE COURT: You are only asking for 15 acres.

MS. HOLLAR: That's correct, Your Honor.

THE COURT: They may wind up with a good deal more than that.

MS. HOLLAR: They claim 42 acres, Your Honor, under the treaty, and it is our position—

THE COURT: If you are right that the settlement legislation was void as inconsistent [41] with the (unintelligible) Organic Act. We have to face up to whether or not they have (unintelligible).

MS. HOLLAR: That's correct, Your Honor. And this is what we are facing and we want to face because that then goes to the reopening of the 1968 case for purposes of resolving the dispute and the interpretation of

the treaty with respect to WICO's rights and I would like to emphasize that it's the position of the citizens that it's better to have police powers on the 42 acres than to relinquish and surrender all of their police powers with respect to 15 acres.

THE COURT: The treaty can limit police powers.

MS. HOLLAR: Your Honor, we believe that an interpretation—

THE COURT: Many treaties limit police powers.

MS. HOLLAR: Yes, Your Honor. We understand that these are debates that have not ever been heard on the merits and it is our [42] contention that if we were given an opportunity to prove what the treaty rights were, we can prove that police powers were contemplated all along from the 1913 letters on the 42 acres and that when it was transferred to the United States in 1917 it was transferred with those police powers intact.

THE COURT: Police powers going so far as to say that you can convert an actual or potential fee into a tenancy for 20 years at market rates?

MS. HOLLAR: I'm sorry? I didn't understand.

THE COURT: It's one thing to say that rights conveyed under a concession to WICO were subject to police power in some respects. It's quite another thing to say that police power extended to the extent of converting an absolute right to a term of years.

MS. HOLLAR: Your Honor—

THE COURT: Subject to market rates.

MS. HOLLAR: I understand your position, Your Honor, but it's our position [43] that the treaty rights that were given to WICO did not contemplate anything more than a license and a right after complying with certain conditions to own the property in fee simple and it's because of that particular situation that we contend that rule against perpetuities were applicable at that time as well as some interpretation as to reasonableness in fulfilling those particular interpretations as to when they could fulfill those rights.

THE COURT: Do you refer to WICO as WICO or WICO?

MS. HOLLAR: WICO, West Indian Company.

THE COURT: WICO?

THE COURT: Your time is up.

MS. HOLLAR: Yes, sir.

THE COURT: Will counsel arrange with our clerk to have prepared a transcript of the oral argument in this case? That can be done afterwards.

(Pause)

* * * *

[47]

CERTIFICATE

I, Michael Feuer, C.S.R., do hereby certify the foregoing to be a true and accurate transcript.

I do further certify that I am a disinterested person in this cause of action and that I am not a relative or attorney of any of the parties or otherwise interested in the action.

/s/ Michael Feuer
MICHAEL FEUER
C.S.R.

CONVENTION BETWEEN THE UNITED STATES
AND DENMARK, ETC.

TREATY SERIES, NO. 629

CONVENTION
BETWEEN
THE UNITED STATES AND DENMARK
39 STAT. 1706

CESSION OF THE DANISH WEST INDIES

SIGNED AT NEW YORK, AUGUST 4, 1916

RATIFICATION ADVISED BY THE SENATE, SEP-
TEMBER 7, 1916

RATIFIED BY THE PRESIDENT JANUARY 16, 1917

RATIFIED BY DENMARK, DECEMBER 22, 1916

RATIFICATIONS EXCHANGED AT WASHINGTON,
JANUARY 17, 1917

PROCLAIMED, JANUARY 25, 1917

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a Convention between the United States of America and Denmark providing for the cession to the United States of all territory asserted or claimed by Denmark in the West Indies, including the islands of St. Thomas, St. John and St. Croix, together with the adjacent islands and rocks, was concluded and signed by

their respective Plenipotentiaries at the City of New York on the fourth day of August, one thousand nine hundred and sixteen, the original of which Convention, being in the English and Danish languages, is word for word as follows:

The United States of America and His Majesty the King of Denmark being desirous of confirming the good understanding which exists between them, have to that end appointed as Plenipotentiaries:

The President of the United States:

Mr. Robert Lansing, Secretary of State of the United States, and His Majesty the King of Denmark:

Mr. Constantin Brun, His Majesty's Envoy extraordinary and Minister plenipotentiary at Washington.

who, having mutually exhibited their full powers which were found to be in due form, have agreed upon the following articles:

Article 1.

His Majesty the King of Denmark by this convention cedes to the United States all territory, dominion and sovereignty, possessed, asserted or claimed by Denmark in the West Indies including the Islands of Saint Thomas, Saint John and Saint Croix together with the adjacent islands and rocks.

This cession includes the right of property in all public, government, or crown lands, public buildings, wharves, ports, harbors, fortifications, barracks, public funds, rights, franchises, and privileges, and all other public property of every kind or description now belonging to Denmark together with all appurtenances thereto.

In this cession shall also be included any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the Islands ceded, and which may now be existing

either in the Islands ceded or in Denmark. Such archives and records shall be carefully preserved, and authenticated copies thereof, as may be required shall be at all times given to the United States Government or the Danish Government, as the case may be, or to such properly authorized persons as may apply for them.

Article 2.

Denmark guarantees that the cession made by the preceding article is free and unencumbered by any reservations, privileges, franchises, grants, or possessions, held by any governments, corporations, syndicates, or individuals, except as herein mentioned. But it is understood that this cession does not in any respect impair private rights which by law belong to the peaceful possession of property of all kinds by private individuals of whatsoever nationality, by municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the Islands ceded.

The congregations belonging to the Danish National Church shall retain the undisturbed use of the churches which are now used by them, together with the parsonages appertaining thereunto and other appurtenances, including the funds allotted to the churches.

Article 3.

It is especially agreed, however, that:

- 1) The arms and military stores existing in the Islands at the time of the cession and belonging to the Danish Government shall remain the property of that Government and shall, as soon as circumstances will permit, be removed by it, unless they, or parts thereof, may have been bought by the Government of the United States; it being however understood that flags and colors, uniforms and such arms or military articles as are

marked as being the property of the Danish Government shall not be included in such purchase.

2) The movables, especially silver plate and pictures which may be found in the government buildings in the islands ceded and belonging to the Danish Government shall remain the property of that Government and shall, as soon as circumstances will permit, be removed by it.

3) The pecuniary claims now held by Denmark against the colonial treasuries of the islands ceded are altogether extinguished in consequence of this cession and the United States assumes no responsibility whatsoever for or in connection with these claims. Excepted is however the amount due to the Danish Treasury in account current with the West-Indian colonial treasuries pursuant to the making up of accounts in consequence of the cession of the islands; should on the other hand this final accounting show a balance in favour of the West-Indian colonial treasuries, the Danish Treasury shall pay that amount to the colonial treasuries.

4) The United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:

a. The concession granted to "Det vestindiske Kompagni" (the West-Indian Company) Ltd. by the communications from the Ministry of Finance of January 18th 1913 and of April 16th 1913 relative to a license to embark, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor.

b. Agreement of August 10th and 14th, 1914 between the municipality of St. Thomas and St. John and "Det vestindiske Kompagni" Ltd. relative to the supply of the city of Charlotte Amalie with electric lighting.

c. Concession of March 12th 1897 to "The Floating Dock Company of St. Thomas Ltd.", subsequently transferred to "The St. Thomas Engineering and Coaling Company Ltd." relative to a floating dock in St. Thomas Harbor, in which concession the maintenance, extension, and alteration of the then existing repairing slip are reserved.

d. Royal Decree Nr. 79 of November 30th 1914 relative to the subsidies from the colonial treasuries of St. Thomas and Sainte Croix to "The West Indian and Panama Telegraph Company Ltd."

e. Concession of November 3rd, 1906, to H. B. Hey to establish and operate a telephone system on St. Thomas island, which concession has subsequently been transferred to the "St. Thomas Telefonselskab" Ltd.

f. Concession of February 28th 1913 to the municipality of Sainte Croix to establish and operate a telephone system in Sainte Croix.

g. Concession of July 16th 1915 to Ejnar Svendsen, an Engineer, for the construction and operation of an electric light plant in the city of Christiansted, Sainte Croix.

h. Concession of June 20th 1904 for the establishment of a Danish West-Indian bank of issue. This bank has for a period of 30 years acquired the monopoly to issue bank-notes in the Danish West India islands against the payment to the Danish Treasury of a tax amounting to ten percent of its annual profits.

i. Guarantee according to the Danish supplementary Budget Law for the financial year 1908-1909 relative to the St. Thomas Harbor's four percent loan of 1910.

5) Whatever sum shall be due to the Danish Treasury by private individuals on the date of the exchange of ratifications are reserved and do not pass by this cession; and where the Danish Government at that date holds property taken over by the Danish Treasury for sums

due by private individuals, such property shall not pass by this cession, but the Danish Government shall sell or dispose of such property and remove its proceeds within two years from the date of the exchange of ratifications of this convention; the United States Government being entitled to sell by public auction, to the credit of the Danish Government, any portion of such property remaining unsold at the expiration of the said term of two years.

6) The Colonial Treasuries shall continue to pay the yearly allowances now given to heretofore retired functionaries appointed in the islands but holding no Royal Commissions, unless such allowances may have until now been paid in Denmark.

Article 4.

The Danish Government shall appoint with convenient despatch an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, and appurtenances which are ceded hereby, and for doing any other act which may be necessary in regard thereto. Formal delivery of the territory and property ceded shall be made immediately after the payment by the United States of the sum of money stipulated in this convention; but the cession with the right of immediate possession is nevertheless to be deemed complete on the exchange of ratifications of this convention without such formal delivery. Any Danish military or naval forces which may be in the islands ceded shall be withdrawn as soon as may be practicable after the formal delivery, it being however understood that if the persons constituting these forces, after having terminated their Danish services, do not wish to leave the Islands, they shall be allowed to remain there as civilians.

Article 5.

In full consideration of the cession made by this convention, the United States agrees to pay, within ninety days from the date of the exchange of the ratifications of this convention, in the city of Washington to the diplomatic representative or other agent of His Majesty the King of Denmark duly authorized to receive the money, the sum of twenty-five million dollars in gold coin of the United States.

Article 6.

Danish citizens residing in said islands may remain therein or may remove therefrom at will, retaining in either event all their rights of property, including the right to sell or dispose of such property or its proceeds; in case they remain in the Islands, they shall continue until otherwise provided, to enjoy all the private, municipal and religious rights and liberties secured to them by the laws now in force. If the present laws are altered, the said inhabitants shall not thereby be placed in a less favorable position in respect to the above mentioned rights and liberties than they now enjoy. Those, who remain in the islands may preserve their citizenship in Denmark by making before a court of record, within one year from the date of the exchange of ratifications of this convention, a declaration of their decision to preserve such citizenship; in default of which declaration they shall be held to have renounced it, and to have accepted citizenship in the United States; for children under eighteen years the said declaration may be made by their parents or guardians. Such election of Danish citizenship shall however not, after the lapse of the said term of one year, be a bar to their renunciation of their preserved Danish citizenship and their election of citizenship in the United States and admission to the nationality thereof on the same terms as may be provided according to the laws of the United States, for other inhabitants of the islands.

The civil rights and the political status of the inhabitants of the islands shall be determined by the Congress, subject to the stipulations contained in the present convention.

Danish citizens not residing in the islands but owning property therein at the time of the cession, shall retain their rights of property, including the right to sell or dispose of such property, being placed in this regard on the same basis as the Danish citizens residing in the islands and remaining therein or removing therefrom, to whom the first paragraph of this articles relates.

Article 7.

Danish subjects residing in the Islands shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the Islands, pursuant to the ordinary laws governing the same, and they shall have the right to appear before such courts, and to pursue the same course therein as citizens of the country to which the courts belong.

Article 8.

Judicial proceedings pending at the time of the formal delivery in the islands ceded shall be determined according to the following rules:

1) Judgments rendered either in civil suits between private individuals, or in criminal matters, before the date mentioned, and with respect to which there is no recourse or right to review under Danish law, shall be deemed to be final, and shall be executed in due form and without any renewed trial whatsoever, by the competent authority in the territories within which such judgments are to be carried out.

If in a criminal case a mode of punishment has been applied which, according to new rules, is no longer applicable on the islands ceded after delivery, the nearest

corresponding punishment in the new rules shall be applied.

2) Civil suits or criminal actions pending before the first courts, in which the pleadings have not been closed at the same time, shall be confirmed before the tribunals established in the ceded islands after the delivery, in accordance with the law which shall thereafter be in force.

3) Civil suits and criminal actions pending at the said time before the Supreme Court or the Supreme Court in Denmark shall continue to be prosecuted before the Danish courts until final judgment according to the law hitherto in force. The judgment shall be executed in due form by the competent authority in the territories within which such judgment should be carried out.

Article 9.

The rights of property secured by copyrights and patents acquired by Danish subjects in the Islands ceded at the time of exchange of the ratifications of this treaty, shall continue to be respected.

Article 10.

Treaties, conventions and all other international agreements of any nature existing between Denmark and the United States shall *eo ipso* extend, in default of a provision to the contrary, also to the ceded islands.

Article 11.

In case of differences of opinion arising between the High Contracting Parties in regard to the interpretation or application of this convention, such differences, if they cannot be regulated through diplomatic negotiations, shall be submitted for arbitration to the permanent Court of Arbitration at The Hague.

Article 12.

The ratifications of this convention shall be exchanged at Washington as soon as possible after ratification by both of the High Contracting Parties according to their respective procedure.

In faith whereof the respective plenipotentiaries have signed and sealed this convention, in the English and Danish languages.

Done at New York this fourth day of August, one thousand nine hundred and sixteen.

[SEAL]

[SEAL]

ROBERT LANSING.
C. BRUN.

And whereas in giving advice and consent to the ratification of the said Convention, it was declared by the Senate of the United States in their resolution that "such advice and consent are given with the understanding, to be expressed as a part of the instrument of ratification, that such Convention shall not be taken and construed by the High Contracting Parties as imposing any trust upon the United States with respect to any funds belonging to the Danish National Church in the Danish West Indian Islands, or in which the said Church may have an interest, nor as imposing upon the United States any duty or responsibility with respect to the management of any property belonging to said Church, beyond protecting said Church in the possession and use of church property as stated in said Convention, in the same manner and to the same extent only as other churches shall be protected in the possession and use of their several properties;"

And whereas it was further provided in the said resolution "That the Senate advises and consents to the rati-

fication of the said Convention on condition that the attitude of the United States in this particular, as set forth in the above proviso, be made the subject of an exchange of notes between the Governments of the two High Contracting Parties, so as to make it plain that this condition is understood and accepted by the two Governments, the purpose hereof being to bring the said Convention clearly within the Constitutional powers of the United States with respect to church establishment and freedom of religion;"

And whereas this condition has been fulfilled by notes exchanged between the two High Contracting Parties on January 3, 1917;

And whereas the said Convention has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the seventeenth day of January, one thousand nine hundred and seventeen;

Now, therefore, be it known that I, Woodrow Wilson, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause therefore may be observed and fulfilled with good faith by the United States and the citizens thereof, subject to the said understanding of the Senate of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty-fifth day of January in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the One hundred and forty-fist.

WOODROW WILSON.

By the President:

ROBERT LANSING,
Secretary of State.

DECLARATION.

In proceeding this day to the signature of the Convention respecting the cession of the Danish West-Indian Islands to the United States of America, the undersigned Secretary of State of the United States of America, duly authorized by his Government, has the honor to declare that the Government of the United States of America will not object to the Danish Government extending their political and economic interests to the whole of Greenland.

ROBERT LANSING.

New York, August 4, 1916.

[Exchange of Notes mentioned in Proclamation.]

[*The Secretary of State to the Danish Minister.*]

DEPARTMENT OF STATE,
WASHINGTON, January 3, 1917.

SIR:

I have the honor to inform you that the Senate of the United States by its resolution of ratification has advised and consented to the ratification of the convention between the United States and Denmark, ceding to the United States the Danish West Indian Islands, with the following provisos:

“Provided, however, That it is declared by the Senate that in advising and consenting to the ratification of the said convention, such advice and consent are given with the understanding, to be expressed as a part of the instrument of ratification, that such Convention shall not be taken and construed by the High Contracting Parties as imposing any trust

upon the United States with respect to any funds belonging to the Danish National Church in the Danish West Indian Islands, or in which the said church may have an interest, nor as imposing upon the United States any duty or responsibility with respect to the management of any property belonging to said church, beyond protecting said church in the possession and use of church property as stated in said Convention, in the same manner and to the same extent only as other churches shall be protected in the possession and use of their several properties. And provided further, that the Senate advises and consents to the ratification of the said Convention on condition that the attitude of the United States in this particular, as set forth in the above proviso, be made the subject of an exchange of notes between the Government of the two High Contracting Parties, so as to make it plain that this condition is understood and accepted by the two Governments, the purpose hereof being to bring the said Convention clearly within the Constitutional powers of the United States with respect to church establishment and freedom of religion."

In view of this resolution of the Senate I have the honor to state that it is understood and accepted by the Government of the United States and the Government of Denmark that the provisions of this Convention referring to the property and funds belonging to the Danish National Church in the Danish West Indian Islands shall not be taken and construed by the High Contracting Parties as imposing any trust upon the United States with respect to any funds belonging to the Danish National Church in the Danish West Indian Islands, or in which the said church may have an interest nor as imposing upon the United States any duty or responsibility with respect to the management of any property belonging to said church, beyond protecting said church in the

possession and use of church property as stated in said Convention, in the same manner and to the same extent only as other churches shall be protected in the possession and use of their several properties.

I trust that your Government will in a formal reply to this communication accept this understanding as to the meaning and construction of the provisions of said Convention in accordance with the foregoing resolution of the Senate.

Accept, Sir, the renewed assurances of my highest consideration.

ROBERT LANSING

Mr. CONSTANTIN BRUN,
Minister of Denmark.

[The Danish Minister to the Secretary of State.]

THE DANISH LEGATION
WASHINGTON, D.C.

January 3rd, 1917.

SIR:

In reply to your communication of this day concerning the relation of the United States to the rights of the Established Church in the Danish West Indies and to the provisions referring to this point in the convention between the United States and Denmark ceding to the States the Danish Westindian Islands, I have the honor to state that it is understood and accepted by the government of Denmark and the Government of the United States that the provisions of this convention referring to the property and funds belonging to the Danish National Church in the Danish Westindian [sic] Islands shall not be taken and construed by the high contracting parties as imposing any trust upon the United States with respect to any fund belonging to the Danish National Church in the Danish Westindian [sic] Islands or in which the said

Church may have an interest nor as imposing upon the United States any duty or responsibility with respect to the management of any property belonging to said church beyond protecting said church in the possession and use of church property as stated in said convention in the same manner and to the same extent only as other churches shall be protected in the possession and use of their several properties.

It will be evident from the above that the Danish Government accept the understanding as to the meaning and construction of the provisions of the said convention in accordance with the resolution of the United States' Senate concerning the question of the rights of the Church in the Islands.

I have the honor, to be, Sir,
with the highest consideration,
Your most obedient and humble servant,

C. BRUN.

The Honorable

ROBERT LANSING,

Secretary of State of the United States.

DENMARK

[Inclosure 3—Exhibit B—Translation]

Nos. 30 and 68

MINISTRY OF FINANCE,
Copenhagen, January 13, 1913.

In a letter dated the 6th instant the company among other things requested to have transferred to it the rights, granted to the consortium for the exploitation through drainage and deepening of an area within the harbor of the Danish West India island of St. Thomas, in the letters from the Ministry of Finance to the consortium of the 2d and 11th (cf. letter of October 14, last year).

In this connection it may be stated that the Ministry of Finance, in view of the fact, that it appears from the secretly adopted by-laws of the company (a copy of which is returned herewith, bearing the mark "Set. Colonies Central Administration, January 17, 1913, A. C. Schlichtkrull") that the company has its domicile at Copenhagen and that a majority of the members of the board of directors must have the rights of Danish citizenship, so that the conditions laid down in the aforementioned letters of the Ministry for the desired transfer of rights are fulfilled hereby permits the company to dam up the areas in St. Thomas Harbor which are marked in red on the plan which accompanied the aforementioned concession granted to the consortium on July 7th of last year, for the exploitation through drainage and deepening of an area within the harbor of the Danish West India Island of St. Thomas which plan is appended, so that when these land areas are reclaimed the company will acquire free and unrestricted ownership thereof, although the company, in so far as such ownership may conflict with private rights, will have to settle with the interested parties. The company shall likewise have exclusive right

to utilize and exploit the basins constructed in conformity with the aforementioned plan. It may especially be remarked, that in consequence of the permit thus given, the company, will be entitled to charge wharfage stake-money, and other similar dues against vessels who come alongside the wharves or otherwise make use of the basins. The wharfage dues shall be charged in accordance with rates established in advance, which rates shall be alike to all.

The company shall likewise be permitted to erect, on the land belonging to it, reservoirs for liquid fuel for ships, observing such reasonable safety measures against conflagration as the proper authority may deem necessary.

Pilotage and harbor dues (including ship dues) shall be paid to the harbor treasury by the ships which come to or utilize the harbor, wharf, mole and dock establishments which may be constructed by the company, to the same extent and according to the same rate as those prevailing at all times in the remainder of St. Thomas Harbor.

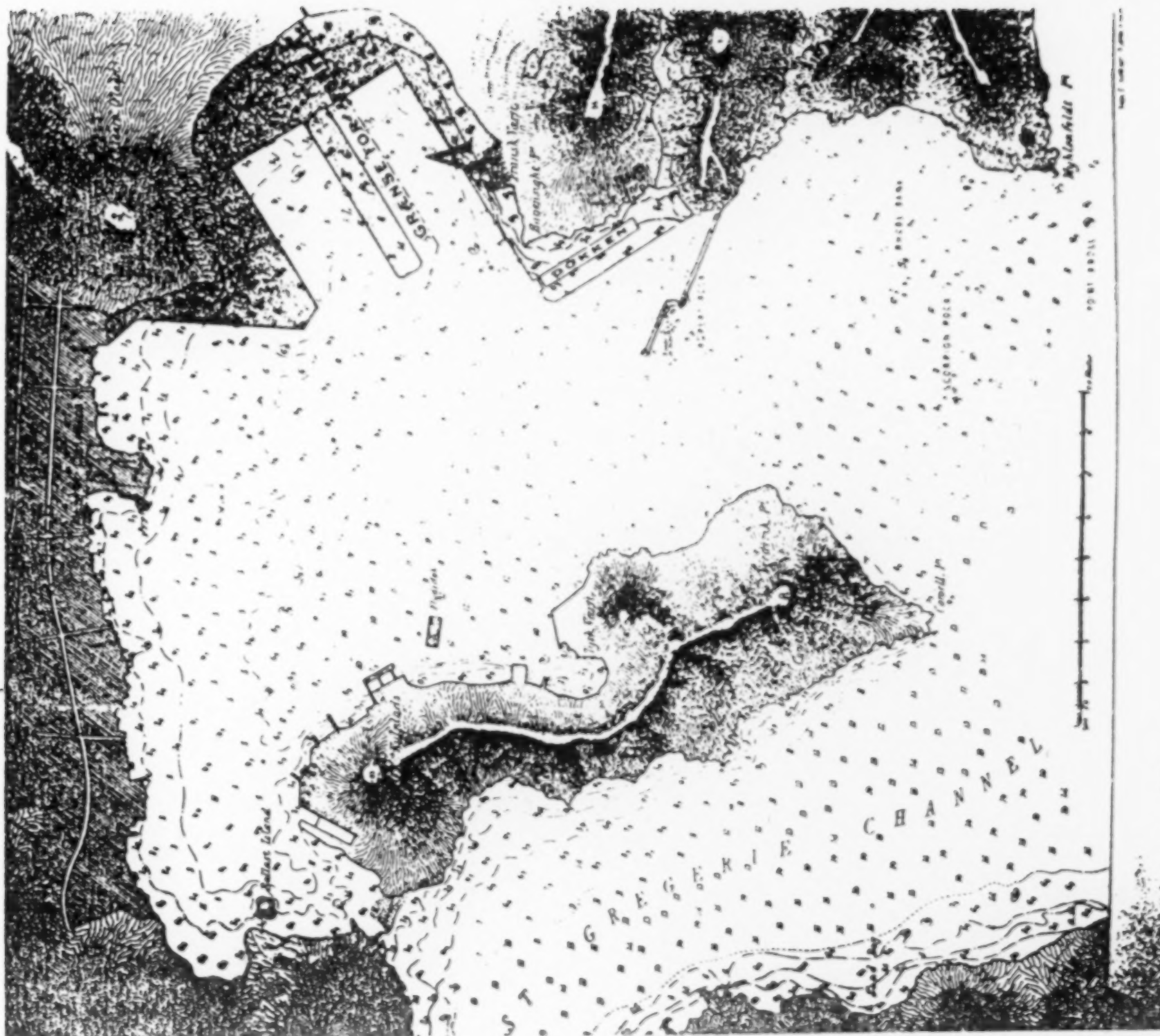
The police supervision over the aforementioned sea and land areas will evolve upon the local harbor police and the general police.

With respect to the application, made in the aforementioned letter of the company for duty free importation of all materials imported for the original installation in and about St. Thomas Harbor of the aforementioned establishments it may be remarked that, in the letter of the 8th instant, the Government for the West Indies Islands was authorized to lay before the colonial council for St. Thomas and St. Jan a proposal for the exemption from customs duties and ship dues of materials imported for establishments in and about St. Thomas Harbor, this proposal reading to the effect that the Government is authorized, for a period of ten years calculated from

January 1, 1913, to grant exemption from customs duties and ship dues on all materials, including working implements and machinery which are imported to St. Thomas as an original installation there of establishments designed to provision or serve ships coming into the harbor, or which are otherwise calculated [to] further the navigation in the harbor.

N. NEERGAARD
C. DINDS BANSSEN

To The West India Company.





MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding, dated as of the 3rd day of October, 1973 among THE UNITED STATES DEPARTMENT OF THE INTERIOR (hereinafter called "Interior"), the Government of the Virgin Islands (hereinafter called the "V.I. Government"), THE WEST INDIAN COMPANY, LIMITED (hereinafter called "WICO"), MAJOR JOSEPH BYERS II, MAJOR BYERS INVESTMENT ASSOCIATES, (hereinafter collectively called "Byers Group"), CARIBBEAN HARBOR CLUB, INC., and JORGE SOUSS and JOSE BLANCO LUGO.

WHEREAS, in 1913 the Government of Denmark gave to The West Indian Company certain rights to reclaim and fill in St. Thomas Harbor, pursuant to which The West Indian Company constructed a large dock and harbor basin, leaving a substantial portion of its rights then unexercised; and

WHEREAS, the Convention between the United States and Denmark, covering acquisition of the Danish Virgin Islands; proclaimed on January 17, 1917, provides in Article 3:

"It is especially agreed, however, that:

* * *

(4) The United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:

a. The concession granted to 'Det vestindiske Kompagni' (The West Indian Company) Ltd. by the communications from the Ministry of Finance of January 18th 1913 and of April 16th 1913 relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor."

WHEREAS, in 1935, pursuant to informal understandings between WICO, the Virgin Islands Government and the U.S. Army Corps of Engineers, fill was placed within the concession area which extended the land area of Lots Nos. 4 and 5, Estate Thomas, Kings Quarters, Virgin Islands, then owned by WICO; and

WHEREAS, by deed dated August 18, 1956, WICO conveyed to Major Byers' Investment Associates Lot No. 4, Estate Thomas, Kings Quarters, St. Thomas, and all right, title and interest therein; and

WHEREAS, by deed dated September 11, 1956, WICO conveyed to Joseph Byers II Lot No. 5, Estate Thomas, Kings Quarters, St. Thomas, and all right, title and interest therein; and

WHEREAS, by deed dated February 15, 1961, Joseph Byers II and Ethel F. Byers conveyed to the Virgin Islands Government Lot No. 5A, Estate Thomas, Kings Quarters, St. Thomas, being a portion of Lot No. 5; and

WHEREAS, in 1963 in the course of a harbor reclaiming project, the Virgin Islands Government placed fill within the concession area seaward of Lots Nos. 4 and 5, which filling was accomplished with the consent of Major Byers and without discussion with WICO; and

WHEREAS, in or about October, 1964, Major Byers' Investment Associates conveyed said Lot No. 4 and all right, title and interest therein to CARIBBEAN HARBOR CLUB, INC., then known as Island Hotels, Ltd.; and

WHEREAS, by deed dated April 9, 1965, Joseph Byers II conveyed to Major Byers' Investment Associates the remaining portion of Lot No. 5; and

WHEREAS, by deed dated April 9, 1965 Joseph Byers II conveyed to Major Byers' Investment Associates all of his right, title and interest in said Lot No. 5; and

WHEREAS, by contract dated September 27, 1966, Major Byers Investment Associates agreed to convey said Lot No. 5 as enlarged by the 1963 fill to Ford Wright, Jr., Adrian Perez-Agudo Albert B. Poe and by deed of October 19, 1936 conveyed all right, title and interest in the said Lot No. 5 to the said parties; and

WHEREAS, Ford Wright, Jr., Adrian Perez-Agudo and Albert B. Poe subsequently sold to Jorge Souss and Jose Blanco Lugo a one-fourth share and undivided interest in said Lot No. 5 as so enlarged; and

Whereas, Ford Wright, Jr., Adrian Perez-Agudo and Albert B. Poe thereafter assigned their remaining interests in Parcel No. 5 as so enlarged to EHG Enterprises, Inc.; and EHG subsequently assigned its interest to CARIBBEAN HARBOR CLUB, INC. (then known as Island Hotels, Ltd.); and

WHEREAS, CARIBBEAN HARBOR CLUB, INC. represents that it has succeeded to such right, title and interest as Ford Wright, Jr., Adrian Perez-Agudo and Albert B. Poe may have had with respect to said Lots Nos. 4 and 5 as so enlarged; and

WHEREAS, the United States commenced an action to a quiet title against WICO and others, United States of America v. The West Indian Company et al., Civil No. 337—1968, District Court of the Virgin Islands, Division of St. Thomas and St. John, in which the United States seeks a determination that the United States is the owner of the 1935 and 1963 filled lands and that the reclaiming rights granted to WICO by the Danish Government have terminated; and

WHEREAS, the Government of Denmark, by Note dated June 17, 1970, requested the Government of the United States to respect the above-quoted provision of the Treaty of Cession; and

WHEREAS, settlement negotiations commenced, and at the suggestion of the United States Interior Depart-

ment such settlement negotiations were pursued by WICO, the Buyers Group and CARIBBEAN Harbor CLUB, INC., with the Virgin Island Government; and

WHEREAS, WICO submitted a settlement proposal to the Governor of the Virgin Islands; and

WHEREAS, the Governor of the Virgin Islands after consideration ordered a public hearing to be held; and

WHEREAS, on October 26, 1971 a public hearing was held in St. Thomas, Virgin Islands at which the "Statement of West Indian Company re: Proposal for Reclaiming Part of Long Bay under its Danish Concession" (hereinafter the "Proposal") was the subject of public hearing and consideration; and

WHEREAS, thereafter the Governor of the Virgin Islands referred the Proposal to the Legislature of the Virgin Islands; and

WHEREAS, in consequence of a request to the Court made by WICO at the pre-trial conference in the above-captioned quiet title action, the District Court recommended to the Governor and Legislature of the Virgin Islands favorable consideration of the proposal; and

WHEREAS, on October 11, 1972 the Virgin Islands Legislature enacted Act. No. 3326, Ninth Legislature of the Virgin Islands of the United States, Fourth Session, 1972, which was approved by the Governor of the Virgin Islands on October 30, 1972, and which provides in full as follows:

"WHEREAS the United States has instituted an action in the District Court of the Virgin Islands, captioned "United States of America vs The West Indian Company, et al, Civil No. 337—1968 To Quiet Title; and

WHEREAS there has been an offer of settlement and compromise put forward by the West Indian Company; and

WHEREAS the offer of settlement and compromise has been the subject of extensive study, investigation and consideration by the Government of the Virgin Islands, acting through the Legislature and the Governor; and

WHEREAS it appears that the offer of settlement and compromise is in the public interest; and

WHEREAS the District Court Judge has recommended consideration of the settlement offer by the Governor and Legislature of the Virgin Islands; Now, Therefore,

BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. The Governor of the Virgin Islands in behalf of the Government of the Virgin Islands shall recommend to the United States Department of Interior and the United States Department of Justice the acceptance and implementation of an offer of settlement and compromise substantially in the form presented by The West Indian Company in *Statement of The West Indian Company re Proposal for Reclaiming Part of Long Bay Under Its Danish Concession*, dated October 26, 1971, as modified by letter from The West Indian Company to Governor Melvin H. Evans, dated November 2, 1971; provided that the West Indian Company will deed to the Government of the Virgin Islands a waterfront highway in front of its proposed development at Frederiksborg Point, in the event such development is undertaken and completed; and provided further that the West Indian Company shall stipulate the period of time within which such Frederiksborg Point development will be undertaken.

Thus passed by the Legislature of the Virgin Islands on October 11, 1972."

WHEREAS, the Justice Department took the view that the settlement Proposal encompassed important matters

outside the scope of said lawsuit and, therefore, any disposition should be made under the Territorial Submerged Lands Act (48 U.S.C. § 1701 et seq.) ; and

WHEREAS, the parties have now reached agreement on the terms hereinafter set forth, which terms are in substance within the framework of the WICO settlement proposal.

WHEREAS, in the circumstances, the conveyances to be made hereunder appear to satisfy a compelling public need in the following respects; among others:

(1) an additional two and one-half acres to the public recreation area near Pearson Garden, almost doubling the size thereof, will be provided by WICO;

(2) filled land for waterfront highway widening from two to four lanes will be provided by WICO;

(3) dredging the harbor in Long Bay will be provided by WICO, thereby benefiting navigation and promoting tourism;

(4) the proposed reclamation will enlarge the area of level land for development near the downtown area of Charlotte Amalie, which is presently limited owing to the hilly terrain;

(5) the development contemplated of the areas to be reclaimed for marinas, cruise ship berth, and development of offices, apartments, shops and related facilities, will tend to provide additional employment for residents of St. Thomas and enhance facilities for tourism;

(6) the termination of any rights remaining to WICO under its Danish grant will eliminate a possible cloud over the future of St. Thomas Harbor, enabling St. Thomas Harbor to be developed on a limited, planned basis, subject to specific time limits;

(7) possible clouds on the title of the V.I. Government waterfront recreation area and on the title of waterfront properties of the Byers Group will be eliminated.

NOW, THEREFORE, the parties agree as follows:

1. *ADDITIONAL RECREATION AREA*

(a) *General.* WICO shall fill the red area (Area I) on the attached map headed "Plan of Part of St. Thomas Harbor" dated October 8, 1971 (hereinafter called the "Map") and quitclaim to the V.I. Government such rights as it may have therein, and the V.I. Government shall make application to the Secretary of the Interior for conveyance to the V.I. Government, pursuant to the Territorial Submerged Lands Act, of such rights as the United States may have in said Area I.

(b) *Description.* The easterly boundary of Area I shall be an extension on the same course, namely S40°-00'W, as the easterly boundary of Lot 5A, Estate Thomas, Kings Quarter, St. Thomas, V.I., as shown in P.W. File No. G9-575-T60. The westerly boundary of Area I shall be an extension on the same course, namely, N80°-00'E as the Westerly boundary of Lot 5A. WICO's obligation shall be to provide an additional area of two and one-half (2½) acres for the V.I. Government, seaward of the existing shoreline and between the easterly and westerly boundaries above described, in general keeping with the plan of reclamation shown on the Map. Should the area of Area I, as determined by survey pursuant to Section 6(d) be less than two and one-half (2½) acres, WICO may supply the deficiency by further fill seaward on lines in general keeping with the contours of the existing shoreline. Alternatively, WICO may supply the deficiency by an adjustment of the easterly or westerly boundaries of Area I. If the existing shoreline shall change materially by reason of natural accretion or reliction prior to the date of completion of

fill, WICO's obligation shall continue to be the provision of two and one-half ($2\frac{1}{2}$) additional acres, and appropriate adjustments shall be made to the seaward boundary to achieve this result.

(c) *Character of Fill.* The fill to be provided for the reclaiming of Area I shall consist substantially of dredge fill from St. Thomas Harbor. WICO's obligation shall be satisfied by providing fill land of similar kind and character to that presently in place in Area II. Without limiting the foregoing, it is specifically agreed that WICO shall not be obligated, unless required by Federal law, to provide bulkheads, retaining walls, rock fill or other structural improvements.

(d) *Time Limits.* WICO shall commence filling Area I not later than nine (9) months from the Closing Date, and shall complete the filling within one and one-half ($1\frac{1}{2}$) months from commencement. However, such completion time shall be extended by the period of any delay caused by the United States or the V.I. Government or of any cause of delay reasonably beyond the control of WICO or its contractors, including within such causes without limitation, Government priorities, intervention by or delays caused by civil, naval, or military authorities, acts of God (other than ordinary storms or inclement wheather [sic] conditions), earthquakes, explosions, lightning, flood, fire, strikes, or other industrial disturbances, riots, insurrections, war, sabotage, vandalism, blockades, embargoes [sic] or epidemics. WICO shall give written notice to the V.I. Government within seven (7) days after commencement of any such excusable delay and similar notice of the date when such delay ended. In addition to such occasions for delay, WICO's obligation to commence filling within nine (9) months is subject to the availability on reasonable commercial terms of a dredge adequate to perform the fill required within the restrictions on dredging elsewhere provided in this Agreement as well as the provisions of applicable law.

2. WIDENING OF FREDERICKSBERG POINT HIGHWAY

(a) *General.* WICO shall provide for the V.I. Government a fill area within Area V on the map sufficient for the widening of the Fredericksberg Point Highway from two lanes to four lanes.

(b) *Description.* WICO's obligation shall be to fill and provide for the V.I. Government an area up to thirty-six (36) feet wide parallel to the present shoreline of Fredericksberg point, adjacent to the present highway, within the limits of Area V on the Map. The actual width shall be determined by what is required for the widening of the highway from two to four lanes. The parties recognize that engineering, cost or similar considerations may make it advisable to exceed the thirty-six (36) foot width in some places and to decrease the thirty-six (36) foot width in others, an overall result being intended to provide an area not exceeding thirty-six (36) feet in average width, the overall result being to provide an area for widening to a four-lane highway.

(c) *Character of Fill.* The provisions of Section 1(c) shall apply, subject to the following additional provisions:

(i) The fill shall be placed to a height approximately the same as the existing highway.

(ii) If WICO should perform the fill for highway widening before proceeding with the reclaiming of the balance of Area V, WICO shall, on [sic] order to protect the road area, place additional dredge fill to a width of twenty (20) feet. Such additional fill would extend from the height of the existing highway to its natural angle of repose. The placing of such fill shall not be deemed to be a commencement of performance by WICO for purpose of Section 6(g). Such additional dredge will shall remain the property of WICO.

(iii) WICO's obligation is limited to providing a fill area for the widening of the highway and WICO assumes no obligation regarding construction of the highway or the cost thereof.

(d) *Time Limits.* The provisions of Section 1(d) shall apply, except that reference to Area I therein shall refer for this purpose to the area for highway widening.

(e) *Obligation of V.I. Government.* This Section does not require the V.I. Government to construct a roadway on the area herein to be provided for widening. However, if the V.I. Government shall not use the area or any portion thereof for highway purposes, it shall grant to WICO a right of way over the area or over any unused portion to and from Area V on the Map during and after reclamation thereof by WICO. In any case WICO shall be entitled to reasonable access from the public highway to and from Area V.

3. CONFIRMATION OF TITLE TO V.I. GOVERNMENT FILLED LAND

WICO shall quitclaim to the V.I. Government all rights it may have in the yellow area (Area II) and to Area II-A on the Map, and the V.I. Government shall make application to the Secretary of the Interior for conveyance to the V.I. Government, pursuant to the Territorial Submerged Lands Act, of such rights as the United States may have in said Area II and II-A, and in Lot 5A, Estate Thomas, Kings Quarter, St. Thomas, V.I. as shown in P.W. File No. G-9-575-T60.

4. TERMINATION OF WICO'S UNEXERCISED CONCESSION RIGHTS

WICO shall quitclaim to the V.I. Government such remaining unexercised rights to reclaim and fill as WICO may have under grant from the Government of Denmark by letters dated January 18 and April 16, 1913. The

United States may enter judgment in the lawsuit captioned United States v. West Indian Company, Ltd., et al., Civil No. 337-1968, now pending in the District Court of the Virgin Islands, against all other parties, without costs as to any party. The order entering judgment shall have to WICO all reclaimed areas heretofore reclaimed by WICO itself and all rights to the harbor basin heretofore constructed by WICO.

5. PAYMENT TO THE UNITED STATES

The United States shall receive a payment of Forty-Five Thousand Dollars (\$45,000).

6. CONVEYANCES

(a) *General.* If the requirements of the Territorial Submerged Lands Act are met, the Secretary of the Interior shall convey to the Government of the Virgin Islands, and the Government of the Virgin Islands shall convey the Filled Lands and Submerged Lands hereinafter described (and the right to reclaim the same) in Long Bay, St. Thomas Harbor, in part to WICO and in part to the Byers Group. The lands to be conveyed are:

A. *Filled Lands.* Lot 5, Estate Thomas, Kings Quarter, as extended by fill in 1963 seaward of Lot 5 and Lot 4, and shown on the Map as Area III.

B. *Submerged Lands.* The areas shown in light blue and dark blue on the attached Map, designated Areas IV, V, VI and VII.

The filled Lands and Submerged Lands are more precisely described below.

All of the Submerged Lands shown in dark blue (Area IV) and light blue on the Map (Areas V, VI and VII) shall be conveyed to WICO. The Filled Lands, Area III on the Map, and the dark blue area on the Map (Area IV), will be divided among WICO, the CARIBBEAN

HARBOR CLUB, INC., and Jorge Souss and Jose Blanco Lugo by separate Agreement between them.

(b) *Description of Filled Lands.* The Filled Lands consist of (a) Lot No. 5, Estate Thomas, Kings Quarter, as described in P.W. Drawing No. G-9-432T56 annexed to deed dated September 11, 1956 from WICO to Joseph Byers II, less the portion thereof conveyed as Lot No. 5A Estate Thomas, Kings Quarter, by deed dated February 15, 1961 from Joseph Byers II and Ethel F. Byers to the Government of the Virgin Islands, as described in P.W. File No. G9-57 5-T60 (said Lot No. 5, as so reduced, being elsewhere referred to in this agreement as "Lot No. 5"); plus (b) the fill area seaward of Lot No. 5 and Lot 4, Estate Thomas, Kings Quarter, placed by the V.I. Government during dredging operations in 1963.

(c) *Deed to Filled Lands; Escrow.* The Grantee to be named in the deed to the Filled Lands shall be as provided in Paragraph "10(d) (ii)". At the closing the deed shall be delivered in escrow to First National City Bank, St. Thomas, U.S. Virgin Islands.

to be delivered on joint written instructions from CARIBBEAN HARBOR CLUB, INC. and Jorge Souss and Jose Blanco Lugo, the Byers Group and WICO. [sic]

(d) *Description of Submerged Lands; Survey.* The submerged Lands are shown in Areas IV, V, VI and VII on the Map. A survey shall be made within 90 days from the execution hereof which shall determine the precise description of such Areas as well as Areas I, II, II-A and III. WICO will undertake to provide such a survey, which shall be subject to the approval of the V.I. Government and the Department of the Interior which approval shall, however, not unreasonably be withheld. Failure to take specific written exceptions to such survey within thirty (30) days following receipt thereof shall conclusively establish acceptance thereof.

(e) *Character of Rights.* The right on WICO's part to reclaim Areas IV, V, and VII is a right on WICO's part to perform the reclaiming and does not impose an obligation on WICO's part to be performed.

(f) *Character of Fill.* The fill of Areas IV, V, VI and VII shall consist substantially of dredge fill from St. Thomas Harbor. WICO shall be entitled to provide such bulkheading, retaining wall, rock fill and similar structures as it may deem appropriate. Prior to construction of any structures on any on any [sic] reclaimed areas, the owner of such area shall provide necessary connections to the public sewerage system so that wastes will not be discharged into the Harbor.

(g) *Time Limits.* As to Areas IV and V on the Map, WICO shall commence reclaiming not later than five (5) years following the Closing Date. As to Areas VI and VII on the Map, WICO shall commence filling not later than ten (10) years following the Closing Date. These time limits are to be extended by the duration of any major decline in tourism in St. Thomas, which shall mean any six-month period during which the number of visitors to St. Thomas shall be thirty percent (30%) less than during the comparable period of 1972; the period of extension for this reason shall in no event exceed five (5) years.

Once work is commenced as to a particular Area, WICO shall proceed with reasonable diligence to completion of that Area. If WICO fails, without reasonable cause, to proceed, the V.I. Government shall have the right, after ninety (90) days written notice (which shall include a demand to proceed), to terminate the reclaiming rights as to the uncompleted portion of such Area. With respect to Area IV, such notice shall also be sent to CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Lugo Blanco, who, upon WICO's failure to proceed shall have the right to complete Area IV at WICO's expense. Reasonable cause shall be such causes as a major decline in

tourism (as above defined) and causes of the sort described in Section 1(d). For purposes of this subparagraph, work shall not be deemed to have commenced as to a particular Area because of the mere placing of incidental fill resulting from the performance of work in some other Area.

7. DREDGING

The dredge area shall be the area from Anchorage Area B on U.S. Coast Guard and Geodetic Survey Chart No. 933 to and along the WICO dock and in Anchorage Area A, on Chart No. 933 to such limits as necessary for accomplishment of the fill.

Dredging is to be performed by the hydraulic suction type system and not by open mechanical means in order to avoid undue effects on water quality. Dredging will be monitored by the V.I. Health Department at the expense of WICO in order to ensure observance of this requirement as well as for compliance with any certifications under the Federal Water Pollution Control Amendments of 1972.

8. WATERFRONT HIGHWAY

(a) *General.* With one (1) year following completion of reclaiming of Area V, WICO will construct and dedicate to the V.I. Government a waterfront highway within Area V. Said time limit shall be subject to the causes of delay set out in Section 1(d).

(b) *Character of Construction.* The waterfront highway shall be two lanes, approximately thirty (30) feet wide, black top or equivalent construction comparable to secondary roads in St. Thomas.

(c) *Location.* The waterfront highway shall roughly parallel the waterfront perimeter of Area V. The seaward boundary of the highway may in WICO's discretion be set back from the shore not more than eighty (80)

feet along the east and west boundaries of Area V, and not more than one hundred (100) feet on the south boundary. The purpose of such permissible set backs is to allow access and service space for marinas on the east and west sides and to allow apron and other space for servicing a cruise ship berth to be located on the south boundary.

(d) *Preservation of View.* In order to preserve a view of the harbor from the waterfront highway, structures to be erected in the area between the highway and the shore shall not exceed in the aggregate twenty percent (20%) of the linear footage of the entire shorefront perimeter of Area V.

(e) *Right of Way.* The V. I. Government shall grant to WICO a right of way to extend, and WICO shall extend, the waterfront highway through and over Area II-A on the Map, so as to connect with the existing Fredericksberg Point Road (as the same may be enlarged to four lanes).

(f) *Acceptance of Dedication.* Upon completion of the waterfront highway as extended, the V.I. Government shall accept a dedication thereof and shall maintain the same as a public highway. Should the V.I. Government refuse to accept such dedication, or should the V.I. Government, following acceptance of dedication, devote such highway to purposes other than highway purposes, all right, title and interest in said highway shall revert to WICO.

9. ENDORSEMENT OF V.I. GOVERNOR

This Agreement shall constitute:

(a) a request, pursuant to the Territorial Submerged Lands Act, by the Governor of the Virgin Islands to the Secretary of the Interior to convey submerged lands and filled lands in accordance with the terms of this Agreement; and

(b) an application, pursuant to the Territorial Submerged Lands Act, for a United States Department of the Interior Submerged Lands Permit or other authorizations, authorizing the dredging, filling, and other work contemplated by this Agreement, with the endorsement of the Governor of the Virgin Islands in favor thereof to the Secretary of the Interior; and

(c) an endorsement of the Governor of the Virgin Islands in favor of an application, pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. § 403) and Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1344) and other related acts, for a United States Army Corps of Engineers permit or other authorizations, authorizing the dredging, filling, and other work contemplated by this Agreement.

Notwithstanding the foregoing, WICO shall not be relieved of the requirement, if applicable, of obtaining a certification under Section 401 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1341).

10. CLOSING

The Closing shall take place on twenty (20) days prior written notice by WICO to the other parties. Such date is referred to in this Agreement as the Closing Date. The closing shall take place at the offices of the Attorney General of the Virgin Islands, St. Thomas, V.I. At or prior to the closing, the following shall be delivered: (a) WICO, the Byers Group, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo shall deliver to the V.I. Government:

(i) a cashiers or certified check in the amount of Forty-Five Thousand Dollars (\$45,000).

(ii) A conveyance or release from WICO in form satisfactory to the Solicitor or Assistant Solicitor

of Interior quitclaiming to the United States the rights described in Section 4.

(iii) Stipulations from each of the parties (other than the United States) to United States v. West Indian Company, Ltd., et al., Civil No. 337-1968, District Court of the Virgin Islands, in form satisfactory to the Solicitor or Assistant Solicitor of Interior consenting to the entry of judgment in favor of the United States and against all other parties, without costs as to any party, including the reservation of rights described in Section 4.

(iv) An opinion of counsel for WICO that WICO is a corporation duly organized and existing under the laws of the Virgin Islands, and this Agreement and all instruments to be delivered hereunder by WICO have been duly authorized, executed and delivered by WICO and are legal, valid and binding obligations of WICO enforceable in accordance with their terms.

(v) An opinion of counsel for the Byers Group that Major Byers Investment Associates is a corporation duly organized and existing under the laws of the Virgin Islands; that this Agreement and all instruments to be delivered hereunder the Byers Group have been duly authorized and delivered by, and are legal, valid and binding obligations of, the person or corporation comprising the Byers Group executing the same.

(vi) An opinion of counsel for the CARIBBEAN HARBOR CLUB, INC. that it is a corporation duly organized and existing under the laws of the U.S. Virgin Islands and has duly qualified to engage in business in the Virgin Islands; that CARIBBEAN HARBOR CLUB, INC. has succeeded to all right, title and interest to Lot No. 5, as defined in Section 6(b), except as to the one-fourth share owned by

Jorge Souss and Jose Blanco Lugo; that this Agreement and all instruments to be delivered hereunder by CARIBBEAN HARBOR CLUB, INC. have been duly authorized, executed and delivered by, and are legal, valid and binding obligations of CARIBBEAN HARBOR CLUB, INC.

(b) WICO, the Byers Group and CARIBBEAN HARBOR CLUB, INC. shall deliver to the V.I. Government:

(i) quitclaim deed from WICO to the V.I. Government in form satisfactory to the V.I. Attorney General, quitclaiming such rights as it may have in Areas II and II-A.

(ii) Opinions of counsel described in Subsections (a) (iv), (v) and (vi) of this Section.

(c) If all applicable requirements of the Territorial Submerged Lands Act have been met and complied with, including approvals by U.S. Congressional Committees, Interior shall deliver to the V.I. Government:

(i) A conveyance from the Secretary of the Interior, pursuant to the Territorial Submerged Lands Act, conveying to the V.I. Government all right, title and interest of the United States in and to areas I, II and II-A, and Lot No. 5A, Estate Thomas, Kings Quarter, St. Thomas, V.I. as shown on P.W. File No. G-9-575-T60.

(ii) A conveyance from the Secretary of Interior, pursuant to the Territorial Submerged Lands Act, conveying to the V.I. Government all right, title and interest of the United States in and to the filled land as described in Section 6(b) and Areas IV, V, VI and VII, for reconveyance in accordance with the terms of this Agreement.

(d) The V.I. Government shall deliver to WICO, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo:

(i) A conveyance from the V.I. Government, pursuant to the Territorial Submerged Lands Act, in form satisfactory to counsel for WICO, conveying subject to the appropriate conditions of this Agreement, to WICO of all right, title and interest of the V.I. Government in Areas IV, V, VI and VII.

(ii) Conveyances pursuant to the Territorial Submerged Lands Act, in form satisfactory to counsel for WICO, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo, from the V.I. Government conveying all right, title and interest of the V.I. Government in the Filled Lands as described in Section 6(b), as follows:

(a) As to that portion of the Filled Lands shown in Public Works Drawing No. F9-1884-T66, an undivided three-fourths ($\frac{3}{4}$) interest to CARIBBEAN HARBOR CLUB, INC., and the remaining undivided one-fourth ($\frac{1}{4}$) interest to Jorge Souss and Jose Blanco Lugo, or to such other grantee or grantees as shall be stated in a joint written notice to the V.I. Government signed by said parties and WICO.

(b) To CARIBBEAN HARBOR CLUB, INC., the remaining portion of the Filled Lands, or to such other grantee or grantees as shall be stated in a joint written notice to the V.I. Government signed by CARIBBEAN HARBOR CLUB, INC. and WICO.

(iii) An opinion of the Attorney General of the Virgin Islands to effect that this Agreement and the conveyances hereunder have been duly authorized, executed and delivered and are legal, valid and binding obligations enforceable in accordance with their terms.

11. GENERAL CONDITIONS

(a) The obligation of WICO to close this Agreement shall be subject to the following conditions:

(i) *Army Corps of Engineers Permit.* The Army Corps of Engineers shall have granted, pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. § 403) and Section 404 of the Federal Water Pollution Control Act (33 U.S.C. § 1344) and other related acts, permit or other authorizations authorizing the dredging, filling, and other work contemplated by this Agreement, which permit or authorizations shall be in form and substance satisfactory to counsel for WICO.

(ii) *Compliance with Territorial Submerged Lands Act.* All appropriate action required to have been taken under the Territorial Submerged Lands Act (48 U.S.C. § 1701-1704) to authorize the conveyances contemplated by this Agreement and otherwise to carry out this Agreement shall have been taken by the Department of Interior and by the V.I. Government, including the proper submission by the Secretary of Interior to the Committees on Interior and Insular Affairs of the House of Representatives and the Senate.

(iii) *Compliance With Other Laws.* All appropriate action required to have been taken under the National Environmental Protection Act of 1969 (42 U.S.C. § 4321-4347), the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. § 1251, et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. § 661-666c) and any other applicable laws, both under Federal and Virgin Island Law, have been taken.

(iv) *Zoning.* The Zoning Maps of St. Thomas shall have been extended and amended so that the following Areas shall be zoned as follows:

<i>Areas:</i>	<i>Zone:</i>
III	Zone W-1 or R-3
IV	Zone W-1 or R-3
V	Zone W-1
VI	Zone W-2

(b) It is understood that neither the Department of the Interior nor the Virgin Islands Government can bind themselves to fulfill the foregoing conditions. However, all parties express their intentions to use their best efforts to meet the conditions within the limits of applicable law.

12. PRESERVATION OF MODIFIED SHORELINES

This Agreement adjusts the differences among the parties as to reclamation rights in Long Bay, St. Thomas. Consequently, it is agreed that neither the United States nor the V.I. Government will reclaim except for public purposes pursuant to the powers of eminent domain, or permit others to reclaim, submerged lands seaward of the areas for reclamation shown on the Map.

13. REPRESENTATIVE OF BYERS GROUP

The Byers Group designates James Bough, Esq., P.O. Box 879, St. Thomas, V.I., as its attorney-in-fact with respect to all matters relating to this Agreement, performance or modification thereof. No member of the Byers Group may terminate the authority of such attorney-in-fact without giving written notice, by registered mail, to each of the other parties to this Agreement. Such notice shall designate a successor attorney-in-fact. Such designation of an attorney-in-fact or successor shall survive the death or incapacity of any individual member of the Byers Group.

14. REPRESENTATIVE OF V.I. GOVERNMENT

The Representative of the V.I. Government authorized to represent the V.I. Government with respect to all matters relating to this Agreement, performance of modifica-

tion thereof, shall be the Attorney General of the Virgin Islands, or such other government official as the V.I. Governor may from time to time designate as successor representative by written notice by registered mail to the other parties hereof.

15. ASSIGNABILITY

(a) WICO's rights to dredge and reclaim are not to be assignable. However, WICO is to be entitled to proceed through a limited partnership, syndicate or other legal form of joint venture customary in real estate development so long as WICO remains responsible for fulfillment of its obligations hereunder and retains a substantial interest in such a joint venture.

(b) Once reclaimed, the areas filled shall belong to WICO in fee simple (except as otherwise provided as to Area IV), subject to applicable zoning requirements, and provided that WICO is then in compliance with Sections 2 and 8 of this Agreement requiring WICO to fill and provide land for the V.I. Government.

Except as otherwise specifically provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties, their successors and assigns.

16. NOTICES and COMMUNICATIONS

To Interior

United States Department of the Interior
Washington, D.C. 20240
Attn: Director, Office of Territorial Affairs
CC: Assistant Solicitor—Territories

To the V.I. Government

Attorney General of the Virgin Islands
Department of Law
P.O. Box 280
St. Thomas, Virgin Islands of U.S. 00801

To WICO

The West Indian Company Limited
P.O. Box 660
St. Thomas, Virgin Islands of U.S.A. 00801
Attn: President

CC: Thomas D. Ireland, Esq.
P.O. Box 100
St. Thomas, Virgin Islands, 00801, and
Haight, Gardner, Poor & Havens
One State Street Plaza
New York, New York 10004
Atten: S. C. Miller, Esq.

To Byers Group

James A. Bough, Esq.
as Representative for Byers Group
P.O. Box 879
St. Thomas, Virgin Islands of U.S.A. 00801

To CARIBBEAN HARBOR CLUB, INC.

P.O. Box 13171
Santurce, Puerto Rico 00908
Attn: Chairman of the Board

CC: Mr. Hector Ceinos
P.O. Box 9065
Santurce, Puerto Rico 00908
William C. Loud, Esq.
P.O. Box 1686
St. Thomas, Virgin Islands 00801

TO: Jorge Souss
P.O. Box 4551
San Juan, Puerto Rico 00905

TO: Jose Blanco Lugo
C/O Jorge Souss
P.O. Box 4551
San Juan, Puerto Rico 00905

17. ACCEPTANCE

Upon receipt of a written notice from WICO that the work contemplated with respect to an Area, or highway widening pursuant to Section 2, or construction of waterfront highway pursuant to Section 8, has been completed and is ready for final inspection and acceptance, the Representative of the V.I. Government (or in case of Area IV, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo, shall promptly cause such inspection to be made and

(a) shall promptly issue a final acceptance certificate under his signature, stating that such work is acceptable and fully performed and accepted pursuant to the terms and conditions of this Agreement and such certificate shall be deemed to be a full performance and discharge of the obligations of WICO thereunder, without any agreement, representation or warranty, expressed or implied, by WICO as to its physical condition, or fitness for any use whatsoever or against any defects whether patent or latent.

(b) in lieu of such certificate, shall promptly deliver to WICO in writing under his signature a statement stating a just and true reason for not issuing such certificate and stating the defects, if any, to be remedied, to entitle WICO to such certificate. Failure to deliver such a statement within ten (10) days of receipt of notice shall constitute acceptance within the terms of subparagraph (a).

18. MISCELLANEOUS

(a) *Eminent Domain.* Nothing in this Agreement shall affect the rights of the United States or the V.I. Government to acquire by eminent domain or condemnation any of the lands or rights therein which are the subject of this Agreement.

(b) *Extensions of Time and Other Matters Relating to Performance.*

Following the Closing, any matters relating to performance or modification of this Agreement may be adjusted or disposed of by agreement between the V.I. Government and WICO, provided that no material enlargement of the seaward bounds of the fill areas may be accomplished without compliance with the Territorial Submerged Lands Act.

(c) *Rights of Others.* As to Area VII, it is understood that WICO's rights to reclaim are subject to WICO's obtaining appropriate consents from the riparian owners (other than WICO itself).

(d) *WICO Authorized to Make Permit Applications.*

To the extent that it may be necessary or advisable for the Byers Group or CARIBBEAN HARBOR CLUB, INC., or Jorge Souss, or Jose Blanco Lugo to join in any of the following applications, the Byers Group, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo authorize WICO or its attorneys on behalf of the Byers Group, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo, respectively, to join in such applications and to take such steps as may be advisable to accomplish the same:

(i) an application (including amendments, renewals, and extensions thereof), pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. § 403) and Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1344) and other related acts, for a United States Army Corps of Engineers permit or other authorizations, authorizing the dredging, filling, and other work contemplated by this Agreement.

(ii) an application (including amendments, renewals, and extensions thereof), pursuant to Section 401 of the Federal Water Pollution Control Act Amendments of

1972 (33 U.S.C. § 1341), for certification, authorizing the dredging, filling and other work contemplated by this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

United States Department of Interior

By:

Director, Office of Territorial
Affairs

Government of the Virgin Islands

By: /s/ Melvin H. Evans
MELVIN H. EVANS
Governor

The West Indian Company, Limited

By: /s/ [Illegible]
President

Attest:

/s/ [Illegible]
Secretary

/s/ Major Joseph Byers II
MAJOR JOSEPH BYERS II

Major Byers Investment Associates

By: /s/ Major Joseph Byers II
President

Attest:

/s/ Ethel F. Byers

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CARIBBEAN HARBOR CLUB, INC.

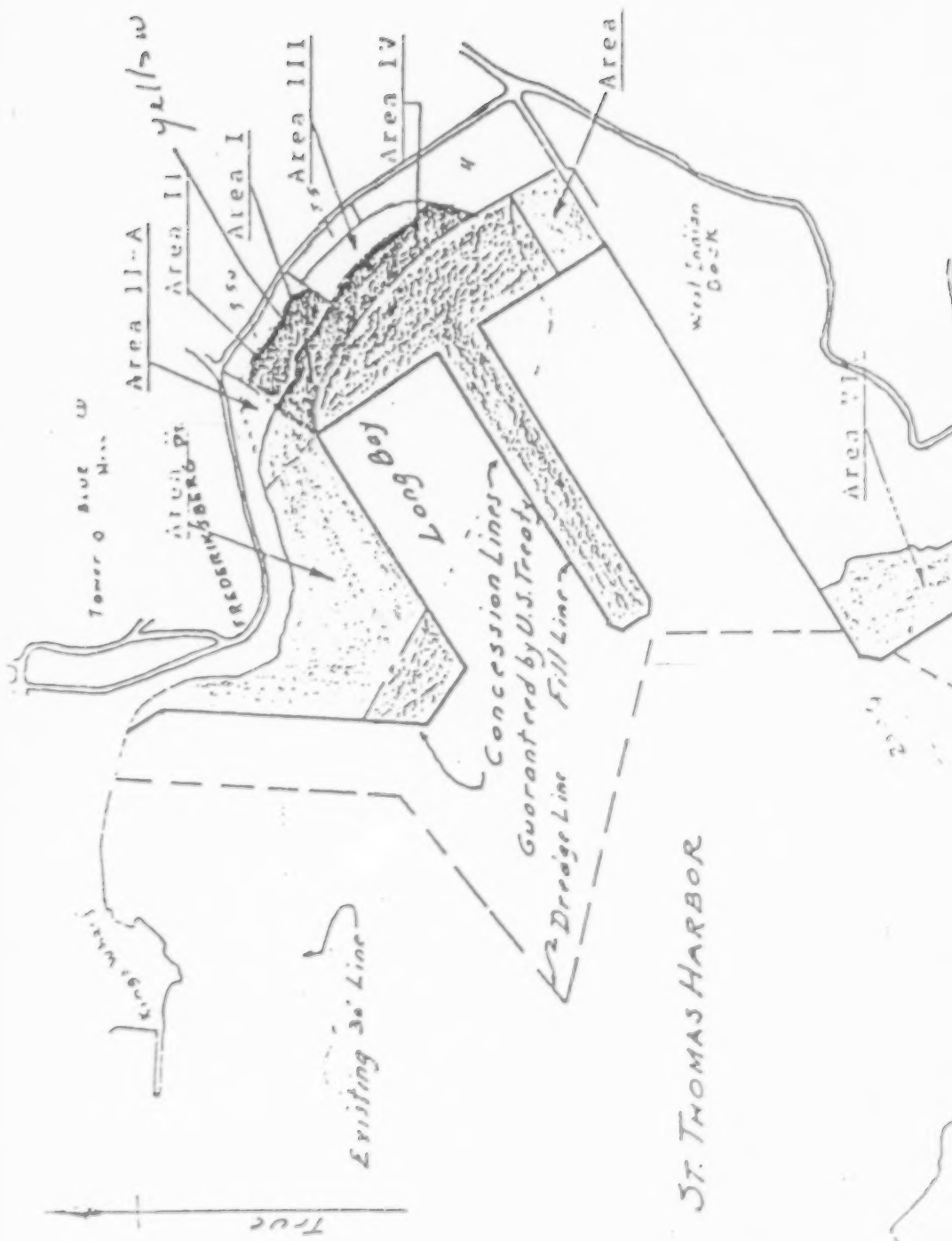
By: /s/ [Illegible]
Chairman of the Board and
Chief Executive Officer

Attest:

/s/ [Illegible]
Secretary

/s/ Jorge Souss
JORGE SOUSS

/s/ Jose Blanco Lubo
JOSE BLANCO LUBO



FIRST ADDENDUM TO
MEMORANDUM OF UNDERSTANDING
DATED AS OF THE 3RD DAY OF OCTOBER, 1973

This FIRST ADDENDUM made as of the 28th day of October, 1975 to Memorandum of Understanding made as of the 3rd day of October, 1973 among THE UNITED STATES DEPARTMENT OF THE INTERIOR (hereinafter called "Interior"), the Government of THE VIRGIN ISLANDS (hereinafter called the "V.I. Government"), THE WEST INDIAN COMPANY, LIMITED (hereinafter called "WICO"), MAJOR JOSEPH BYERS II, MAJOR BYERS INVESTMENT ASSOCIATES (hereinafter collectively called "Byers Group"), CARIBBEAN HARBOR CLUB, INC. and JORGE SOUSS and JOSE BLANCO LUGO.

WHEREAS, Public Law 93-435, 88 STAT. 1210 approved October 5, 1974 (hereinafter "the Act") conveys, subject to the reservations therein set forth, to the Government of the Virgin Islands the right, title and interest of the United States in and to the filled lands and submerged lands which are the subject of this Memorandum of Understanding; and

WHEREAS, the parties understand that the conveyance accomplished by Subsection (a) of the first section of the Act includes any right, title and interest which the United States may acquire under or by virtue of said Memorandum of Understanding, including, without limitation, Section 4 thereof; and

WHEREAS, the parties denied to make provisions regarding the effect of such conveyance; and

WHEREAS, it is desired to correct an error in the description of certain of the areas subject to the Memorandum of Understanding and to correct an error in respect to the V.I. Government agency authorized to monitor dredging.

NOW, THEREFORE, it is agreed that the Memorandum of Understanding dated as of the 3rd day of October, 1973 be amended as follows:

I

(A) There shall be deleted from Section 1(a) the following:

"and the V.I. Government shall make application to the Secretary of the Interior for conveyance to the V.I. Government, pursuant to the Territorial Submerged Lands Act, of such rights as the United States may have in said Area I."

(B) There shall be deleted from Section 3 the following:

"and the V.I. Government shall make application to the Secretary of the Interior for conveyance to the V.I. Government, pursuant to the Territorial Submerged Lands Act, of such rights as the United States may have in said Area II and II-A and in Lot 5A, Estate Thomas, Kings Quarter, St. Thomas, V.I. as shown in P.W. File No. G-9-575-T60."

(C) The first line of Section 4 shall be amended to read as follows:

"WICO shall quitclaim to the V.I. Government such"

(D) Section 5 shall be amended to read as follows:

"5. *PAYMENT TO THE VIRGIN ISLAND* [sic] *GOVERNMENT*."

The Virgin Island [sic] Government shall receive a payment of Forty-Five Thousand Dollars (\$45,000)."

(E) There shall be deleted from Section 6(a) the following:

"If the requirements of the Territorial Submerged Lands Act are met, the Secretary of the Interior

shall convey to the Government of the Virgin Islands, and"

(F) There shall be deleted from Section 6(d) the following:

"and the Department of the Interior"

(G) There shall be deleted from Section 9 subsections (a) and (b) thereof.

(H) Section 10 shall be modified in the following respects:

(1) By changing the words "to Interior" in the second line of Section 10(a) to read "to the V.I. Government";

(2) By amending Section 10(a)(ii) to read as follows:

"(ii) A conveyance or release from WICO in form satisfactory to the V.I. Attorney General the rights described in Section 4."

(3) By deleting Section 10(c).

(4) By deleting the words "pursuant to the Territorial Submerged Lands Act" from Section 10(d)(i) and (ii).

(I) Section 11 shall be modified by deleting Section 11(ii).

These foregoing amendments to the Memorandum of Understanding shall become effective One Hundred Twenty (120) days after enactment of the Act, subject to the authority of the President to designate certain submerged lands pursuant to Subsection (b)(vii) of the first section of the Act. To the extent that said authority is exercised with respect to the lands which are the subject of the Memorandum of Understanding, these amendments shall be inapplicable.

II

The Memorandum of Understanding is hereby amended effective upon the execution of this Addendum, as follows:

(A) Section 1(b) shall be amended to read as follows:

“(b) *Description.* The easterly boundary of Area I shall be an extension of the easterly boundary of Parcel 5A, Estate Thomas, Kings Quarter, St. Thomas, V.I., namely S40°00’W, as shown on P.W. File No. G9-575 T60. This bearing is now correlated to Lambert Grid and has a bearing of S32°47’39’’W. The easterly boundary of Area I shall extend for a distance of approximately 205 feet from the intersection of the course of the easterly boundary of Lot 5A with the existing shore line. The westerly boundary of Area I shall have a direction related to Lambert Grid of S46°21’43’’W starting from the bound post at the Southwestern corner of Parcel 5A, and shall extend for a distance of approximately 204 feet from the intersection of the course with the existing shore line. WICO’s obligation shall be to provide an additional area of two and one-half (2-1/2) acres for the V.I. Government, seaward of the existing shortline and between the easterly and westerly boundaries above described, in general keeping with the plan of reclamation shown on the Map. Should the area of Area I, as determined by survey pursuant to Section 6(d) be less than two and one-half (2 1/2) acres, WICO may supply the deficiency by further fill seaward on lines in general keeping with the contours of the existing shoreline. Alternatively, WICO may supply the deficiency by an adjustment of the easterly or westerly boundaries of Area I.”

(B) Section 7 shall be modified by changing the words “V.I. Health Department” in the fourth line of the sec-

ond paragraph to read "V.I. Department of Conservation and Cultural Affairs (or such other agency of the V.I. Government as may be authorized to monitor such dredging)."

IN WITNESS WHEREOF, the parties have executed this Addendum as of the day and year first above written.

UNITED STATES DEPARTMENT OF INTERIOR

By /s/ Illegible
Director, Office of Territorial
Affairs

GOVERNMENT OF THE VIRGIN ISLANDS

By /s/ Cyril E. King
CYRIL E. KING, Governor

THE WEST INDIAN COMPANY, LIMITED

By /s/ Illegible
President

ATTEST:

/s/ Illegible
Secretary

/s/ Major Joseph Byers II
MAJOR JOSEPH BYERS II

MAJOR BYERS INVESTMENT ASSOCIATES

By /s/ Major Joseph Byers II
President

ATTEST:

/s/ Ethel F. Byers

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CARIBBEAN HARBOR CLUB, INC.

By /s/ Illegible
Chief Executive Officer

ATTEST:

/s/ Illegible

/s/ Jorge Souss
JORGE SOUSS

/s/ Jose Blanco Lugo
JOSE BLANCO LUGO

SECOND ADDENDUM TO MEMORANDUM OF
UNDERSTANDING DATED AS OF THE 3RD DAY
OF OCTOBER, 1973

(Revised)

This SECOND ADDENDUM made as of the — day of ———, 1981, to Memorandum of Understanding made as of the 3rd day of October, 1973 among the GOVERNMENT OF THE VIRGIN ISLANDS (hereinafter called the "V.I. Government"), THE WEST INDIAN COMPANY, LIMITED (hereinafter called WICO), THE ESTATE OF MAJOR JOSEPH BYERS II, MAJOR BYERS INVESTMENT ASSOCIATES (hereinafter collectively called "Byers Group"), CARIBBEAN HARBOR CLUB, INC and JORGE SOUSS and JOSE BLANCO LUGO, as amended by a First Addendum thereto made as of the 28th day of October, 1975.

WHEREAS, subsequent to said Memorandum of Understanding and the First Addendum thereto, Act No. 4248. Twelfth Legislature of the Virgin Islands was enacted, adding to Title XII, Virgin Islands Code, a new Chapter 21, entitled "Virgin Islands Coastal Zone Management"; and

WHEREAS, WICO has asserted that Act No. 4248 constituted a material breach of the Memorandum of Understanding and that the V.I. Government has committed certain other breaches of the Memorandum of Understanding which breaches are continuing, and that such breaches entitle WICO to damages from the V.I. Government in amounts exceeding \$5,000,000 and other relief; and

WHEREAS, the V.I. Government denies that any breaches have occurred; and

WHEREAS, the parties wish to compose their differences and to further amend the Memorandum of Understanding.

NOW, THEREFORE, it is agreed that the Memorandum of Understanding dated as of the 3rd day of October, 1973, as amended by the First Addendum thereto dated as of the 28th day of October, 1975, be further amended and restated to read in full as follows:

1. ADDITIONAL AND MODIFIED RECREATION AREA

(a) *General.* WICO shall fill the areas marked Area A-1 and Area A-2 on the attached plan, captioned Plan attached to Second Addendum to Memorandum of Understanding, hereinafter referred to as the "Plan".

(b) *Character of Fill.* The fill to be provided for the reclaiming of Areas A-1 and A-2 shall consist substantially of dredge fill from St. Thomas Harbor or clean upland fill in WICO's discretion. It is specifically agreed that WICO shall be obligated to provide only such bulkheads, retaining walls, rock fill or other structural improvements as are required by Federal law or in the judgment of the V.I. Government (presently represented by the Department of Conservation and Cultural Affairs ("DCCA")) are necessary to meet minimum sound engineering practice. WICO shall be entitled to place said Improvements on the Area to be retained by WICO.

(c) *Time Limits.* WICO shall commence filling Areas A-1 and A-2 not later than nine (9) months from the Closing Date, and shall complete the filling within six (6) months from commencement. However, such time limits shall be extended by the period of any delay caused by the United States or the V.I. Government or of any cause of delay reasonably beyond the control of WICO or its contractors, including without limitation, intervention by or delays caused by civil, naval or military authorities, acts of God (other than ordinary storms of inclement weather conditions), explosions, fires, strikes, riots, insurrections, war or embargoes. In the event of such a delay, WICO shall give written notice to the V.I. Government

within seven (7) days after commencement of any such delay and shall specify the reason for the delay and the likely length of the delay, and shall give similar notice of the date when the delay ends. In addition to such occasions for delays, WICO's obligation to commence filling within nine (9) months is subject to the availability on reasonable commercial terms of a dredge adequate to perform the fill required within the restrictions on dredging elsewhere provided in this Agreement as well as the provisions of applicable law.

(d) *Conveyances.* (1) At the Closing WICO shall deliver into an escrow account to be established a quitclaim deed conveying to the V.I. Government all right, title and interest of WICO in that portion of Area A on the Plan marked Area A-1, such Area A-1 to consist of 2.1 acres. The lines shown on the Plan are approximate, it being understood that the area to be conveyed is 2.1 acres, seaward of the existing shoreline and between the existing shoreline adjacent to Veterans Drive and the existing shoreline of Areas II and II-A shown on the Map annexed to the original Memorandum of Understanding, in general keeping with the area shown on the Plan. Should the area of Area A-1 be less than 2.1 acres, WICO may supply the deficiency by further fill seaward on lines in general keeping with the contours of the shoreline existing immediately prior to commencement of the fill. Alternatively, WICO may supply the deficiency by an adjustment of the easterly boundary of Area A-1.

(2) At the Closing the V.I. Government shall deliver into an escrow account to be established a quitclaim deed conveying to WICO all right, title and interest in that portion of Area A on the Plan marked Area A-2, such Area A-2 presently being submerged lands and consisting of approximately 2.2 acres.

(3) At the Closing the V.I. Government shall deliver into an escrow account to be established a quitclaim deed conveying to WICO all right, title and interest of the V.I.

Government in the area shown on the Plan as Area A-3, such Area A-3 to consist of 1.1 acres, which land is presently filled land. The lines shown on the Plan are approximate, it being understood that the area to be conveyed is 1.1 acres. To the extent that Area A-3 is more or less than 1.1 acres, the excess or deficiency shall be adjusted by adjusting the westerly boundary of Area A-3.

(4) The deeds referred to in subsections (2) and (3) hereof shall include the right on the part of WICO to construct docks and piers for marina purposes within the area shown as A-4 on the Plan, but WICO shall not acquire title to such Area A-4.

With respect to Area A-4, until WICO gives notice to the V.I. Government that it is proceeding with the construction of docks and piers for marina purposes, the Department of Conservation and Cultural Affairs shall have the right to grant mooring rights, but such rights shall be terminable on not more than 90 days' notice.

2. (Deleted)

3. CONFIRMATION OF TITLE TO V.I. GOVERNMENT FILLED LAND

WICO shall quitclaim to the V.I. Government all rights it may have on the yellow area (Area II) on the Map except Area A-3 on the Plan, and to Area II-A on the Map.

4. TERMINATION OF WICO'S UNEXERCISED CONCESSION RIGHTS

WICO shall quitclaim to the V.I. Government any and all such remaining unexercised rights to reclaim and fill as WICO may have under grant from the Government of Denmark by letters dated January 18 and April 16, 1913. The United States may enter judgment in the lawsuit captioned *United States v. West Indian Company, Ltd., et al.*, Civil No. 337-1968, now pending in the District

Court of the Virgin Islands, against all other parties, without costs as to any party. The order entering judgment shall save to WICO all rights to the harbor basin heretofore constructed by WICO; provided, however, that Area VI may not be employed by WICO for reclaiming. Nothing shall interfere with WICO's rights to use Area VI for or in connection with piers, docks or wharves.

The attached composite map of Long Bay, St. Thomas entitled "Composite Map of Long Bay, February, 1981," generally describes the areas to be quitclaimed to the V.I. Government and the areas to be retained by WICO. The composite map is intended to be generally descriptive, but shall not control as to specific metes and bounds.

5. OBLIGATION TO REPLACE TENNIS COURTS

(a) WICO shall be obligated to replace the tennis courts presently located on Area A-3 on the following terms:

(1) The V.I. Government has the option to have the courts relocated either on Area A-1 when reclaimed or at another location of its choosing in St. Thomas, provided that such location is level and drained.

(2) On 60 days' notice to proceed, which notice shall indicate the location chosen, WICO shall commence replacement of the tennis courts and shall complete them with due diligence; provided that if the courts are to be relocated on Area A-1, notice shall not be given until reclaiming has been completed.

(b) In the alternative, the V.I. Government may choose to be paid \$45,000.

(c) Within 60 days of the Closing, the V.I. Government shall indicate which alternative it has selected.

(d) In connection with the reclaiming of Area A-1 and Area A-2, if necessary WICO shall have the right of access over Area A-3.

6. CONVEYANCES

(a) *General.* The Government of the Virgin Islands shall convey by Quitclaim Deed the Filled Lands and Submerged Lands hereinafter described (and the right to reclaim the same) in Long Bay, St. Thomas Harbor, in part to WICO and in part to the Byers Group. The lands to be conveyed are:

A. *Filled Lands.* Lot 5, Estate Thomas, Kings Quarter, as extended by fill placed in 1963 seaward of Lot 5 and Lot 4, and shown on the Map as Area III.

B. *Submerged Lands.* The area shown in dark blue on the attached Map, designated Area IV and Area VII-A.

C. The lands described in Section 1 as amended by this Second Addendum.

The Filled Lands and Submerged Lands are more precisely described below.

All of the Submerged Lands shall be conveyed to WICO. The Filled Lands, Area III on the Map, and the dark blue area on the Map (Area IV), will be divided among WICO, the CARIBBEAN HARBOR CLUB, INC., and Jorge Souss and Jose Blanco Lugo by separate Agreement between them.

(b) *Description of Filled Lands.* The Filled Lands consist of (a) Lot No. 5, Estate Thomas, Kings Quarter, as described in P.W. Drawing No. G-9-432T56 annexed to deed dated September 11, 1956 from WICO to Joseph Byers II, less the portion thereof conveyed as Lot No. 5A Estate Thomas, Kings Quarter, by deed dated February 15, 1961 from Joseph Byers II and Ethel F. Byers to the Government of the Virgin Islands, as described in P.W. File No. G9-57-5-T60 (said Lot No. 5, as so reduced, being elsewhere referred to in this Agreement as "Lot No. 5"); plus (b) the fill area seaward of Lot No. 5 and

Lot No. 4, Estate Thomas, Kings Quarter, placed by the V.I. Government during dredging operations in 1963.

(c) *Deed to Filled Lands; Escrow.* The grantee to be named in the deed to the Filled Lands shall be as provided in Paragraph 10(d) (ii). At the Closing the deed shall be delivered in escrow to Flint National City Bank, St. Thomas, U.S. Virgin Islands to be delivered on joint written instructions from CARIBBEAN HARBOR CLUB, INC., Jorge Souss, Jose Blanco Lugo, the Byers Group and WICO.

(d) *Description of Submerged Lands; Survey.* The Submerged Lands are shown as Area IV on the Map. A survey has heretofore been made and accepted showing the precise description of all Areas shown on the Map. WICO will undertake to provide such additional surveys as may be necessary to show the changes accomplished by the Second Addendum, which shall be subject to the approval of the V.I. Government, which approval shall, however, not unreasonably be withheld. Failure to take specific written exceptions to such survey within sixty (60) days following receipt thereof shall conclusively establish acceptance thereof.

(e) *Character of Rights.* The right on WICO's part to reclaim Areas IV, A-2 and VII-A is a right on WICO's part to perform the reclaiming and does not impose an obligation on WICO's part to be performed.

(f) *Character of Fill.* The fill of Areas IV, A-2 and VII-A shall consist substantially of dredge fill from St. Thomas Harbor or clean upland fill in WICO's discretion, or in respect of Area VII-A, in WICO's discretion, in whole or in part the construction of docks, wharves, or piers. WICO shall be entitled to provide such bulkheading, retaining wall, dock fill and similar structures as it may deem appropriate.

(g) *Restrictions on Use of Area VII-B.* Area VII-B may not be employed by WICO for reclaiming but only

for the construction of docks or piers for marina purposes, and breakwater or causeway for protection of marina, and WICO shall not obtain title to such Area VII-B.

With respect to Area VII-B, until WICO gives notice to the V.I. Government that it is proceeding with the construction of docks and piers for marina purposes, the Department of Conservation and Cultural Affairs shall have the right to grant mooring rights, but such rights shall be terminable on not more than 90 days' notice.

(h) *Time Limits.* As to Area IV, WICO shall commence filling not later than ten (10) years following the Closing Date. These time limits are to be extended as to Area VII-A by the duration of any major decline in tourism in St. Thomas, which shall mean any six-month period during which the number of visitors to St. Thomas shall be thirty percent (30%) less than during the comparable period of 1972; the period of extension for this reason shall in no event exceed five (5) years.

Once work is commenced as to a particular Area, WICO shall proceed with reasonable diligence in completion of that Area. With respect to Area VII-A, WICO may elect to reclaim a portion of the Area without relinquishing the balance, provided that reclaiming of the remaining portion or portions shall be commenced within the same ten (10) year time limit above provided. If WICO fails, without reasonable cause, so to proceed to completion, the V.I. Government shall have the right, after ninety (90) days' written notice (which shall include a demand to proceed) to terminate the reclaiming rights as to the uncompleted portion of such Area, other than Area VII-A. With respect to Area IV, such notice shall also be sent to CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo, who, upon WICO's failure to proceed shall have the right to complete Area IV at WICO's expense. Reasonable cause shall be the causes described in Section 1(c). For pur-

poses of this Subparagraph, work shall not be deemed to have commenced as to a particular Area because of the mere placing of incidental fill resulting from the performance of work in some other Area.

7. DREDGING

The dredge area shall be the area from Anchorage Area B on U.S. Coast Guard and Geodetic Survey Chart No. 933 to and along the WICO dock and in Anchorage Area A, on Chart No. 933 and within or adjacent to Area VII-A as shown on the Plan, to such limits as necessary for the accomplishment of the fill.

Dredging is to be performed by the hydraulic suction type system and not by open mechanical means in order to avoid undue effects on water quality. Dredging will be monitored by the V.I. Department of Conservation and Cultural Affairs (or such other agency of the V.I. Government as may be authorized to monitor such dredging) at the expense of WICO in order to ensure observance of this requirement as well as for compliance with any certifications under the Federal Water Pollution Control Amendments of 1972.

8. [Deleted.]

9. ENDORSEMENT OF V.I. GOVERNOR

This Agreement shall constitute an endorsement of the Governor of the Virgin Islands in favor of an application, pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. § 403) and Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1344) and other related acts, for a United States Army Corps of Engineers permit or other authorizations, authorizing the dredging, filling, and other work contemplated by this Agreement.

Notwithstanding the foregoing, WICO shall not be relieved of the requirement, if applicable, of obtaining a

certification under Section 401 of the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. § 1341).

10. CLOSING

The Closing shall take place on thirty (30) days' prior written notice by WICO to the other parties. Such date is referred to in this Agreement as the Closing Date. The Closing shall take place at the offices of the Attorney General of the Virgin Islands, St. Thomas, V.I. At or prior to the Closing, the following shall be delivered:

(a) WICO, the Byers Group, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo shall deliver to the V.I. Government:

(i) A conveyance or lease from WICO in form satisfactory of the V.I. Attorney General of the rights described in Section 4.

(ii) Stipulations from each of the parties (other than the United States) to *United States v. West Indian Company, Ltd., et al.*, Civil No. 337-1968, District Court of the Virgin Islands, in form satisfactory to the Solicitor or Assistant Solicitor of Interior consenting to the entry of judgment in favor of the United States and against all other parties, without costs as to any party, including the reservation of rights described in Section 4.

(iii) An opinion of counsel for WICO that WICO is a corporation duly organized and existing under the laws of the Virgin Islands, and this Agreement and all Instruments to be delivered hereunder by WICO have been duly authorized, executed and delivered by WICO and are legal, valid and binding obligations of WICO enforceable in accordance with their terms.

(iv) An opinion of counsel for the Byers Group that Major Byers Investment Associates is a corpo-

ration duly organized and existing under the laws of the Virgin Islands; that this Agreement and all instruments to be delivered hereunder by the Byers Group have been duly authorized and delivered by, and are legal, valid and binding obligations of, the person or corporation comprising the Byers Group executing the same.

(v) An opinion of counsel for the CARIBBEAN HARBOR CLUB, INC. that it is a corporation duly organized and existing under the laws of the U.S. Virgin Islands and has duly qualified to engage in business in the Virgin Islands; that CARIBBEAN HARBOR CLUB, INC. has succeeded to all right, title and interest to Lot No. 5, as defined in Section No. 6(b), except as to the one-fourth share owned by Jorge Souss and Jose Blanco Lugo; that this Agreement and all instruments to be delivered hereunder by CARIBBEAN HARBOR CLUB, INC. have been duly authorized, executed and delivered by, and are legal, valid and binding obligations of CARIBBEAN HARBOR CLUB, INC.

(b) WICO, the Byers Group and CARIBBEAN HARBOR CLUB, INC. shall deliver to the V.I. Government:

(i) a quitclaim deed from WICO to the V.I. Government in form satisfactory to the V.I. Attorney General, quitclaiming such rights as it may have in Area II (excluding Area A-3) and Area II-A.

(ii) Opinions of counsel described in Subsections (c) (iii), (iv) and (v) of this Section.

(c) The V.I. Government shall deliver to WICO, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo:

(i) A conveyance from the V.I. Government by quitclaim deed, in form satisfactory to counsel for WICO, conveying subject to the appropriate condi-

tions of the Agreement, to WICO of all right, title and interest of the V.I. Government in Areas IV and VII-A, together with rights to construct and maintain marinas in Area VII-B and the conveyances described in Section 1(D) (2) and (3).

(ii) Conveyances by quitclaim deed, in form satisfactory to counsel for WICO, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo, from the V.I. Government conveying all right, title and interest of the V.I. Government in the Filled Lands described in Section 6(b), as follows:

(a) As to that portion of the Filled Lands shown in Public Works drawing No. F9-1884-T66, an undivided three-fourths ($3/4$) interest to CARIBBEAN HARBOR CLUB, INC., and the remaining undivided one-fourth ($1/4$) interest to Jorge Souss and Jose Blanco Lugo, or to such other grantee or grantees as shall be stated in a joint written notice to the V.I. Government signed by said parties and WICO.

(b) To CARIBBEAN HARBOR CLUB, INC., the remaining portion of the Filled Lands, or to such other grantee or grantees as shall be stated in a joint written notice to the V.I. Government signed by CARIBBEAN HARBOR CLUB, INC. and WICO.

(iii) An opinion of the Attorney General of the Virgin Islands to the effect that this Agreement and the conveyances hereunder have been duly authorized, executed and delivered and are legal, valid and binding obligations enforceable in accordance with their terms.

(d) (i) An escrow shall be established with First National City Bank or other mutually acceptable escrow agent, effective on the Closing. There shall be deposited

with the escrow agent the deeds and conveyances and stipulations described in Sections 10(a)(i) and (ii), 10(B)(i) and 10(c)(i) (other than the conveyances relating to Area VII-A), (ii) and (iii). The V.I. Government and WICO shall cause the escrow agent to deliver such deeds and conveyances as follows:

(x) Upon acceptance of Area A-1 in accordance with Section 17 hereof; and

(y) The completion of reclaiming of Areas IV and A-2; provided, however, that if WICO shall have reclaimed less than all of such Areas and its rights to reclaim the balance shall have terminated, the conveyances shall be amended so as to exclude any portion of the Area as to which the reclaiming rights shall have terminated.

(ii) An escrow shall be established with First National City Bank or other mutually acceptable escrow agent, effective on the Closing. There shall be deposited with the escrow agent the deeds and conveyances relating to Area VII-A as follows:

Upon completion of a portion of Area VII-A, if WICO shall have proceeded to reclaim a portion, then a conveyance amended to include such portion shall be delivered when such portion is completed; or if the whole is completed, then a conveyance of the whole shall be delivered; provided, however, that if WICO shall have reclaimed less than all of such Areas and its rights to reclaim the balance shall have terminated, the conveyances shall be amended so as to exclude any portion of the Area as to which the reclaiming rights shall have terminated.

The parties shall pay the fees of the escrow agent as follows: WICO one-half and the V.I. Government one-half.

11. GENERAL CONDITIONS

(a) (i) The obligation of WICO to close this Agreement shall be subject to the following conditions:

(x) *Army Corps of Engineers Permit.* The Army Corps of Engineers shall have granted, pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. § 403) and Section 404 of the Federal Water Pollution Control Act (33 U.S.C. § 1344) and other related acts, permit or other authorizations authorizing the dredging, filling, and other work contemplated by this Agreement, which permit or authorizations shall be in form and substance satisfactory to counsel for WICO.

(y) *Compliance with Other Laws.* All appropriate action required to have been taken under the National Environmental Protection Act of 1969 (42 U.S.C. §§ 4321-4347), the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. § 1251, et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. §§ 661-666c) and any other applicable laws, both under Federal and Virgin Islands law, have been taken.

(z) *Enactment of Laws.* There shall have been enacted into law an amendment to the Virgin Islands Coastal Zone Management Act in the form annexed hereto as Exhibit A or in such other form which shall in form and substance be satisfactory to counsel for WICO and satisfactory to counsel for the Department of Conservation and Cultural Affairs, V.I. Government.

(ii) The obligation of the V.I. Government to close this Agreement shall be subject to the following condition:

There shall have been enacted into law an amendment to the Virgin Islands Coastal Zone Manage-

ment Act in the form annexed hereto as Exhibit A or in such other form which shall in form and substance be satisfactory to counsel for WICO and satisfactory to counsel for the Department of Conservation and Cultural Affairs, V.I. Government.

(b) Within 6 months after filling of the relevant Areas III, IV, A-2, A-3 and VII-A will be zoned in accordance with the permitted uses as provided herein. If the land should be zoned other than to permit the uses provided herein, then the uses provided herein, shall be permitted subject to the provisions of Section 12(b).

Uses Permitted for Areas III, IV, A-2 and A-3

Hotel, Motel, Guesthouse
 Restaurant, Bar, Coffee Shop
 Marina and allied service facilities
 Apartments, Dwellings
 Shops
 Offices

(Customary accessory uses are permitted)

Uses Permitted for Area VII-A

Waiver dependent, and water related commercial-industrial uses and marina facilities
 Including warehousing
 Building supplies
 Restaurants
 Professional offices and access to adjacent dock and uplands.

One or more of the above categories of uses are permitted in a built-up area not exceeding a total of 40% of total land area, which may be executed in one building or several buildings of one or more stories.

Height Restriction

No structure shall exceed a total of three stories.

Required Parking and Loading Area

Off-street parking and off-street loading shall be provided in accordance with the Virgin Islands Zoning Law.

Usable Open Space

In addition to the requirements set forth herein for permitted lot occupancy and for off-street parking, thirty (30) percent of the area of the zoning lot shall be reserved for usable open space.

Number of Parcels

The plots may be developed separately, or if joined in title, as one plot at the owner's option.

12. (a) DEVELOPMENT TIME FRAME

The provisions of this Agreement relating to zoning, permitted uses, height restriction, required parking and loading area, usable open space and the impact of the Virgin Islands Coastal Zone Management Act shall be in effect with respect to each Area provided that development of such Area is commenced within ten (10) years after filling of such Area and completed within fifteen (15) years after filling of such Area. Any portion of the development not commenced within ten (10) years and completed within fifteen (15) years after filling, and any development beyond that explicitly contemplated by this Agreement shall be subject to then current laws. This shall in no way impair rights to repair, maintain and reconstruct structures, roads, etc. which have been erected during said time periods.

(b) IMPACT OF VIRGIN ISLANDS COASTAL ZONE MANAGEMENT ACT

The specific provisions of this Agreement shall govern as to WICO's right to reclaim and to acquire title, to reclaimed areas and to develop, and as to permitted uses,

height restriction, usable open space and parking which shall not be matters of discretion, but as to any matters not specifically covered by the Agreement, such as utilities, siting, performance standards, design and landscape, WICO shall be subject to the requirement of a Coastal Zone Management permit in accordance with the provisions of the Virgin Islands Coastal Zone Management Act and the goals and policies of the Virgin Islands Coastal Zone Management Act.

(c) All parties agree to use their best efforts to meet the conditions and otherwise carry out this Agreement. Without limiting this obligation, the V.I. Government shall confirm to the Army Corps of Engineers that all necessary local permits have been issued and that the V.I. Government fully supports the issuance of the Corps of Engineers permit enabling the project, as herein modified, to proceed.

13. PRESERVATION OF MODIFIED SHORELINES

This Agreement adjusts the differences among the parties as to reclamation rights in Long Bay, St. Thomas. Consequently, it is agreed that neither the United States nor the V.I. Government will reclaim except for public purposes pursuant to the powers of eminent domain, or permit others to reclaim, submerged lands seaward of the areas for reclamation shown on the Map, as modified by this Second Addendum, and the Plan.

14. REPRESENTATIVE OF BYERS GROUP

The Byers Group designates James Bough, Esq., P.O., Box 879, St. Thomas, V.I., as its attorney-in-fact with respect to all matters relating to this Agreement, performance or modification thereof. No member of the Byers Group may terminate the authority of such attorney-in-fact without giving written notice, by registered

mail, to each of the other parties to this Agreement. Such notice shall designate a successor attorney-in-fact. Such designation of an attorney-in-fact or successor shall survive the death or incapacity of any individual member of the Byers Group.

15. REPRESENTATIVE OF V.I. GOVERNMENT

The Representative of the V.I. Government authorized to represent the V.I. Government with respect to all matters relating to this Agreement, performance or modification thereof, shall be the Attorney General of the Virgin Islands, or such other government official as the V.I. Governor may from time to time designate as successor representative by written notice by registered mail to the other parties hereof.

16. ASSIGNABILITY

(a) WICO's rights to dredge and reclaim are not to be assignable. However, WICO is to be entitled to proceed through a limited partnership, syndicate or other legal form of joint venture so long as WICO remains responsible for fulfillment of its obligations hereunder and retains a substantial interest in such a joint venture.

(b) Once reclaimed, WICO shall have title to and ownership of the areas filled (except as otherwise provided as to Area IV and except as to Area VII(B, subject to applicable zoning requirements, and provided that WICO is then in compliance with Section 2 of this Agreement requiring WICO to fill and provide land for the V.I. Government.

Except as otherwise specifically provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties, their successors and assigns.

17. NOTICES AND COMMUNICATIONS

To the V.I. Government

Attorney General of the Virgin Islands
Department of Law
P.O. Box 280
St. Thomas, U.S. Virgin Islands 00801

cc: Commissioner
Department of Conservation and Cultural
Affairs
P.O. Box 4340
St. Thomas, U.S. Virgin Islands 00801

To WICO

The West Indian Company, Limited
P.O. Box 660
St. Thomas, U.S. Virgin Islands 00801
Attn: President

cc: Thomas D. Ireland, Esq.
P.O. Box 100
St. Thomas, U.S. Virgin Islands 00801, and
Haight, Gardner, Poor & Havens
One State Street Plaza
New York, New York 10004
Attn: S.C. Miller, Esq.

To Byers Group

James A. Bough, Esq.
as Representative for Byers Group
P.O. Box 879
St. Thomas, U.S. Virgin Islands 00801

TO CARIBBEAN HARBOR CLUB, INC.

P.O. Box 13171
Santurce, Puerto Rico 00908
Attn: Chairman of the Board

cc: Mr. Hector Celnos
P.O. Box 9069
Santurce, Puerto Rico 00908

William C. Loud, Esq.
P.O. Box 1686
St. Thomas, U.S. Virgin Islands 00801

To Jorge Souss, Esq.
Playa Grande Condominium
Apartment 6-F
Santurce, Puerto Rico 00911

To Jose Blanco Lugo
c/o Jorge Souss, Esq.
Playa Grande Condominium
Apartment 6-F
Santurce, Puerto Rico 00911

18. ACCEPTANCE

Upon receipt of a written notice from WICO that work contemplated with respect to an Area has been completed and is ready for final inspection and acceptance, the Representative of the V.I. Government (or in the case of Area IV, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo), shall promptly cause such inspection to be made and

(a) shall promptly issue a final acceptance certificate under his signature, stating that such work is acceptable and fully performed and accepted pursuant to the terms and conditions of this Agreement and such certificate shall be deemed to be a full performance and discharge of the obligation of WICO thereunder, without any agreement, representation or warranty, expressed or implied, by WICO as to its physical condition, or fitness for any use whatsoever against any defects whether patent or latent;

(b) In lieu of such certificate, shall promptly deliver to WICO in writing under his signature a statement stating a just and true reason for not issuing such certificate and stating the defects, if any, to be remedied, to entitle WICO to such certificate. Failure to deliver such a statement within sixty (60) days of receipt of notice shall constitute acceptance within the terms of Subparagraph (a).

19. MISCELLANEOUS

(a) *Eminent Domain.* Nothing in this Agreement shall affect the rights of the United States or the V.I. Government to acquire by eminent domain or condemnation any of the lands or rights therein which are the subject of this Agreement.

(b) *Extensions of Time and Other Matters Relating To Performance.*

Following the Closing, any matters relating to performance or modification of this Agreement may be adjusted or disposed of by agreement between the V.I. Government and WICO, provided that no material enlargement of the seaward bounds of the fill areas may be accomplished without compliance with the Virgin Islands Coastal Zone Management Act, Act No. 4248.

(c) *Rights of Others.* As to Area VII-A, it is understood that WICO's rights to reclaim are subject to WICO's obtaining appropriate consents, if any, from the riparian owners (other than WICO itself). As to Area VII-B, WICO's rights to construct docks and piers for marina uses shall be subject to appropriate consents, if any, from the riparian owners (other than WICO itself).

(d) *WICO Authorized to Make Permit Applications.*

To the extent that it may be necessary or advisable for the Byers Group or CARIBBEAN HARBOR CLUB, INC., or Jorge Souss, or Jose Blanco Lugo to join in any of the following applications, the Byers Group, CARIB-

BEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo authorize WICO or its attorneys on behalf of the Byers Group, CARIBBEAN HARBOR CLUB, INC., Jorge Souss and Jose Blanco Lugo, respectively, to join in such applications and to take such steps as may be advisable to accomplish the same:

(i) an application (including amendments, renewals, and extensions thereof), pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. § 403) and Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1344) and other related acts, for a United States Army Corps of Engineers permit or other authorizations, authorizing the dredging, filling, and other work contemplated by this Agreement.

(ii) an application (including amendments, renewals, and extensions thereof), pursuant to Section 401 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1341), for certification, authorizing the dredging, filling and other work contemplated by this Agreement.

(c) *No Further Charges.* No fee, rental or charge shall be imposed for rental or similar use or for taking dredge fill pursuant to the terms of this Agreement.

20. RELEASE OF CLAIMS

Upon the enactment of the legislation described in Section 11(a)(iii) and (iv) and upon the performance of such acts and the delivery of such documents as are necessary to carry out the V.I. Government's obligations under this Agreement as amended by this Second Addendum, the V.I. Government shall be released from all claims by WICO arising out of or relating to any alleged breach or nonperformance by the V.I. Government under the Memorandum of Understanding as amended by the First Addendum thereto.

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IN WITNESS WHEREOF, the parties have executed this Addendum as of the day and year first above written.

GOVERNMENT OF THE VIRGIN ISLANDS

By /s/ Juan Luis
Governor 4/22/81

THE WEST INDIAN COMPANY, LIMITED

By /s/ [Illegible]
President 4/23/81

Attest:

/s/ [Illegible]
Secretary

ESTATE OF MAJOR JOSEPH BYERS III

By /s/ Ethel F. Byers

MAJOR BYERS INVESTMENT ASSOCIATES

By /s/ Ethel F. Byers
President

Attest:

/s/ [Illegible]

ALL AMERICA HOLDING CORPORATION,
as Successor in Interest to
CARIBBEAN HARBOR CLUB, INC.

By /s/ [Illegible]
Chief Executive Officer

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Attest:

/s/ [Illegible]

/s/ Jorge Souss
JORGE SOUSS

/s/ Jose Blanco Lugo
JOSE BLANCO LUGO

ESTATE OF MAJOR JOSEPH BYERS III

By /s/ [Illegible]

MAJOR BYERS INVESTMENT ASSOCIATES

By /s/ [Illegible]
President

Attest:

/s/ [Illegible]

ALL AMERICA HOLDING CORPORATION,
as Successor in Interest to
CARIBBEAN HARBOR CLUB, INC.

By /s/ [Illegible]
Chief Executive Officer

Attest:

/s/ [Illegible]
Assistant Secretary

/s/ Jorge Souss
JORGE SOUSS

/s/ Jose Blanco Lugo
JOSE BLANCO LUGO

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(BILL 16-0607)

No. 5188

(Became law August 11, 1986)

To Repeal Act Nos. 3326 and 4700 Pertaining to the West Indian Company, Ltd. and for Other Purposes.

Be it enacted by the Legislature of the Virgin Islands:

Section 1. (a) Act No. 3326 (Bill No. 5632), enacted October 30, 1972, is hereby repealed in its entirety.

(b) Act No. 4700 (Bill No. 14-0664), enacted April 7, 1982, is hereby repealed in its entirety.

Section 2. Any and all activities that are conducted in Long Bay by the West Indian Company, Ltd. shall comply with the provisions of the Coastal Zone Management Act, Title 12, chapter 21, Virgin Islands Code. Any permit for the development or occupancy of the submerged lands in Long Bay must be sent to the Governor for approval and the Legislature for ratification.

The foregoing Bill having been vetoed by the Governor of the Virgin Islands on July 21, 1986, and subsequently repassed by the Sixteenth Legislature of the Virgin Islands on August 11, 1986, has become law as of August 11, 1986, on which date the Legislature voted to override the veto.

Derek M. Hodge
Acting Lieutenant Governor

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ACT NO. 4700

BILL NO. 14-0664

FOURTEENTH LEGISLATURE OF THE
VIRGIN ISLANDS OF THE UNITED STATES

Regular Session

1982

To amend Title 12, Chapter 21, Virgin Islands Code, pertaining to coastal zone management

—0—

BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. Title 12, Section 905, Subsection (i), Virgin Islands Code, is amended by adding thereto a new paragraph (5) to read as follows:

“(5) any treaty right, grant, or concession which was vested in any party prior to the date of enactment of this Chapter and which in whole or in part has been expressly recognized by statute, court order, or lawfully executed agreement as binding on the Government of the Virgin Islands, whether such recognition precedes or succeeds the date of enactment of this Chapter, and subject to any agreements or Memorandums of understanding pertaining to such right, grant, or concession which have been or may hereafter be ratified by law.”

SECTION 2. The Agreement entitled “The Second Addendum to Memorandum of Understanding Dated as of the 3rd Day of October, 1978”, dated the 22nd day of September 1981, between the Government of the Virgin Islands, the West Indian Company, Limited, and Others, which is attached hereto as Appendix A and by this reference made a part hereof, is hereby ratified with the full force and effect of law, and the Governor and Departments of the Government of the Virgin Islands, and

all Instrumentalities thereof are authorized and directed, within the scope of their jurisdiction, to execute the terms of such Agreement.

Thus passed by the Legislature of the Virgin Islands on March 24, 1982.

Witness our Hands and the Seal of the Legislature of the Virgin Islands this 24th Day of March, A.D., 1982.

/s/ Ruby M. Rouss
RUBY M. ROUSS
President

/s/ Ruby Simmonds
RUBY SIMMONDS
Legislative Secretary

(Bill 5632)

No. 3326*

(Approved October 30, 1972)

Bill Relating to Certain Lands Located at Long Bay, St. Thomas.

WHEREAS the United States has instituted an action in the District Court of the Virgin Islands, captioned "United States of America v. The West Indian Company, et al., Civil No. 337-1968" To Quiet Title; and

WHEREAS there has been an offer of settlement and compromise put forward by the West Indian Company; and

WHEREAS the offer of settlement and compromise has been the subject of extensive study, investigation and consideration by the Government of the Virgin Islands, acting through the Legislature and the Governor; and

WHEREAS it appears that the offer of settlement and compromise is in the public interest; and

WHEREAS the District Court Judge has recommended consideration of the settlement offer by the Governor and Legislature of the Virgin Islands; Now, Therefore,

Be it enacted by the Legislature of the Virgin Islands:

Section 1. The Governor of the Virgin Islands in behalf of the Government of the Virgin Islands shall recommend to the United States Department of Interior and the United States Department of Justice the acceptance and implementation of an offer of settlement and compromise substantially in the form presented by The West Indian Company in *Statement of The West Indian Company re Proposal for Reclaiming Part of Long Bay Under Its Danish Concession*, dated October 26, 1971, as

* Enacted as part of the Fourth Special Session.

modified by letter from The West Indian Company to Governor Melvin E. Evans, dated November 2, 1971; provided that the West Indian Company will deed to the Government of the Virgin Islands a waterfront highway in front of its proposed development at Frederiksburg Point, in the event such development is undertaken and completed; and provided further that the West Indian Company shall stipulate the period of time within which such Frederiksburg Point development will be undertaken.

Approved October 30, 1972.

SIXTEENTH LEGISLATURE OF THE
VIRGIN ISLANDS

REGULAR SESSION

JULY 9, 1986

PART I

CHARLOTTE AMALIE,
ST. THOMAS, VIRGIN ISLANDS

BEFORE:

Senator Derek M. Hodge

APPEARANCES:

Senator John A. Bell
Senator Lorraine L. Berry
Senator Virdin C. Brown
Senator Adelbert M. Bryan
Senator Hector L. Cintron
Senator Clement Magras
Senator Cleone Creque Maynard
Senator James A. O'Bryan, Jr.
Senator Lilliana Belardo de O'Neal
Senator Holland Redfield, II
Senator Ruby M. Rouss
Senator Allan Paul Shatkin
Senator Iver A. Stridiron

* * * *

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Regular Session—Part II—July 9, 1986

* * *

[40] SENATOR HODGE: Senator Stridiron?

SENATOR STRIDIRON: Yes. Mr. President, this amendment raises perhaps what would be a most interesting question to ask of the proponent as well as other members of the Legislature. With regard to West Indian Company, what is it that the people want? Do they want us to stop the dredging? Or do they want us to allow the dredging and then change the zoning? Because basically this amendment says, if you wish you can go forward and dredge and fill. But we will have rezoned it so that the public will have use of the property. What is that the people want?

I reserve the balance of my time.

SENATOR HODGE: Senator Bryan?

SENATOR BRYAN: Thank you, Mr. President. To the previous speaker, the amendment [41] added to the bill to repeal Acts 4700 and 3326, would then designate the existing area as public. And would prevent anybody or person or group or corporation from erecting any structures not consistent with the zone that is being created. What activities are going on right now as far as the dredging is concerned is a situation that is being handled by Conservation. As a matter of fact, I think a cease and desist order was issued sometimes last week. And that is because last week I made a reference to what they were doing, was dredging in the night and stopping two or three o'clock in the morning. So by the time daylight comes around, it looks like nothing really was disturbed.

And what we are doing now is setting the land for public use. I am not saying for the West Indian Company to go ahead. I am saying that what is there right now, because they have created other lands when they

dredge the sand. So that is basically what this amendment seeks to do.

I reserve the rest of the time.

. . . .

[43] SENATOR HODGE: Senator Bryan?

SENATOR BRYAN: I think Senator Stridiron is playing a little game with us here. The land that is right there, if you can see it, you can walk through those sands and get in the water. So I'm saying that that land, if you read Act 4700 and the agreement, makes reference to certain concessions to West Indian Company. The repeal of those acts, in fact, would stop West Indian Company and those involved believing that that land was West Indian Company land. It is not West Indian Company land. So I'm saying while it is the people's land, we rezoning it public for the people. That's all we are saying. We are not saying continue to dredge. They have already started the dredging already. Before there wasn't all that sand there before they started to dredge. So they created some land. So I'm saying that that they created recently, plus what was there previously, is now public. But at the same time we are repealing Acts 4700 and 3326, is in fact saying that the Legislature and the Governor and all involved had no authority to give away the trust lands or the submerged lands.

So we are saying two things. The land belongs to the people, and we are now zoning it public for the people. Am I clear?

. . . .

[48] SENATOR HODGE: All right. Senator Shatkin, you had a question?

SENATOR SHATKIN: Yes, Mr. President. I have a question for counsel. Through the Chair to legal counsel, because there's an issue here which I think is not being raised, which is vitally important. Attorney Sturdivant, my call to the Tax Assessor's Office indicated

that the owner of record of Parcel No. 5 is a Joseph Byers. I don't know who Josepy Byers is. But my question to you is, if this amendment passes, and the designation is changed from W-1 to P, what does that indicate the government has done, and what responsibilities or liabilities does that create for the government?

MS. STRUDIVANT: Well, it would mean that the government has taken private property, and converted it into publicly owned property. It seems to me that it would constitute a taking under the constitution. And as such, the government would have to give some sort of compensation for that taking.

SENATOR BRYAN: Point of order.

SENATOR BROWN: Point of order.

* * * *

[51] SENATOR HODGE: Record Senator Bell's vote as yes.

MS. STEELE: Mr. President, 5 yeas, 8 nays, 2 absent.

SENATOR HODGE: Amendment fails. Senator Brown, No. 378 you wish to offer?

* * * *

REVISED ORGANIC ACT OF 1954,
48 U.S. CODE ANNOTED
§ 1541 *et seq.*

BILL OF RIGHTS

§ 3. [Rights and prohibitions]

No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.

In all criminal prosecutions the accused shall enjoy the right to be represented by counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witness against him, and to have compulsory process for obtaining witnesses in his favor.

No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal cause to give evidence against himself; nor shall any person sit as judge or magistrate in any case in which he has been engaged as attorney or prosecutor.

All persons shall be bailable by sufficient sureties in the case of criminal offenses, except for first-degree murder or any capital offense when the proof is evident or the presumption great.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

No law impairing the obligation of contracts shall be enacted.

No person shall be imprisoned or shall suffer forced labor for debt.

All persons shall have the privilege of writ of habeas corpus and the same shall not be suspended except as herein expressly provided.

No ex post facto law or bill of attainder shall be enacted.

Private property shall not be taken for public use except upon payment of just compensation ascertained in the manner provided by law.

The right to be secure against unreasonable searches and seizures shall not be violated.

No warrant for arrest or search shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Slavery shall not exist in the Virgin Islands.

Involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted by a court of law, shall not exist in the Virgin Islands.

No law shall be passed abridging the freedom of speech or of the press or the right of the people peaceably to assembly¹ and petition the government for the redress of grievances.

No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof.

No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of the Virgin Islands or of the United States shall be qualified to hold any office of trust or profit under the government of the Virgin Islands.

No money shall be paid out of the Virgin Islands treasury except in accordance with an Act of Congress

¹ So in original.

or money bill of the legislature and on warrant drawn by the proper officer.

The contracting of polygamous or plural marriages is prohibited.

The employment of children under the age of sixteen years in any occupation injurious to health or morals or hazardous to life or limb is prohibited.

Nothing contained in this Act shall be construed to limit the power of the legislature herein provided to enact laws for the protection of life, the public health, or the public safety.

No political or religious test other than an oath to support the Constitution and the laws of the Virgin Islands, shall be required as a qualification to any office or public trust under the Government of the Virgin Islands.—July 22, 1954, ch. 558, § 3, 68 Stat. 497; Aug. 28, 1958, Pub. L. 85-851, § 1, 72 Stat. 1094.

§ 8. [Legislative powers and activities]

[Scope of authority; limitation on enactments and taxation]

(a) The legislative authority and power of the Virgin Islands shall extend to all rightfull subjects of legislation not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of nonresidents be taxed at a higher rate than the lands or other property of residents.

TITLE 48 U.S. CODE ANNOTED § 1701

GUAM—VIRGIN ISLANDS—AMERICAN SAMOA—
SUBMERGED LANDS

PUBLIC LAW 88-183; 77 STAT. 338

[H.R. 2073]

An Act to authorize the Secretary of the Interior to convey certain submerged lands to the governments of Guam, the Virgin Islands, and American Samoa, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

(a) Upon the request of the Governor of Guam, the Governor of the Virgin Islands, or the Governor of American Samoa, the Secretary of the Interior is authorized to convey to the government of the territory concerned whatever right, title, or interest the United States has in particular tracts of tidelands, submerged lands, or filled lands in or adjacent to the territory, subject to the limitations contained in this section. The term "tidelands, submerged lands, or filled lands" means for the purposes of this Act all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines of the territory, as heretofore or hereafter modified by accretion, erosion, and reliction, including artificially made, filled-in, or reclaimed lands which were formerly permanently or periodically covered by tidal waters.

(b) No conveyance shall be made pursuant to this section unless the land proposed to be conveyed is clearly required for specific economic development purposes or to satisfy a compelling public need.

(c) No conveyance shall be made pursuant to this section until the expiration of sixty calendar days (exclusive of days on which the House of Representatives or the Senate is not in session because of an adjournment of more than three days to a day certain) from the date on which the Secretary of the Interior submits to the Committees on Interior and Insular Affairs of the House of Representatives and the Senate an explanatory statement indicating the tract proposed to be conveyed and the need therefor, unless prior to the expiration of such sixty calendar days both committees inform the Secretary that they wish to take no action with respect to the proposed conveyance.

(d) Conveyances pursuant to this section shall be subject to such terms and conditions as the Secretary of the Interior may deem appropriate and shall be made without reimbursement or with such reimbursement as he may deem appropriate.

(e) The governments of Guam, the Virgin Islands, and American Samoa shall have proprietary rights of ownership and the rights of management, administration, leasing, use, and the development of the lands conveyed pursuant to this section, but the Secretary of the Interior and such territorial governments shall not have the power or right to convey title to such lands unless the Secretary of the Interior (1) determines that such right to convey is necessary and (2) advises the committee of such determination in the manner described in subsection (c) of this section, and (3) unless the Secretary of the Interior, in proposing to convey such lands to such territorial governments, and such territorial governments in proposing to convey such lands to a third party or third parties pursuant to this section, shall publish notice of such proposed conveyance at least once a week for three weeks in a daily newspaper or newspapers of general circulation in the territory affected by the proposed conveyance. Such published notice shall include the names of all parties to the proposed contract of conveyance, the

purchase price, and a general summary of the boundaries of the tract or tracts proposed to be included in the conveyance.

(f) There shall be excepted from conveyances made pursuant to this section all deposits of oil, gas, and other minerals, but the term "minerals" shall not include sand, gravel, or coral.

Sec. 2. (a) The Secretary of the Interior shall have administrative responsibility for all tidelands, submerged lands, or filled lands in or adjacent to Guam, the Virgin Islands, and American Samoa, except (1) lands conveyed pursuant to section 1 of this Act, (2) lands that are not owned by the United States on the date of enactment of this Act, and (3) lands that are within the administrative responsibility of any other department or agency of the United States on the date of enactment of this Act, for so long as such condition continues. In exercising such authority, the Secretary may grant revocable permits, subject to such terms and conditions as he may deem appropriate, for the use, occupancy, and filling of such lands, and for the removal of sand, gravel, and coral therefrom.

(b) Nothing contained in this section shall affect the authority heretofore conferred upon any department, agency, or officer of the United States with respect to the lands referred to in this section.

Sec. 3. (a) Nothing in this Act shall affect the right of the President to establish naval defensive sea areas and naval airspace reservations around and over the islands of Guam, American Samoa, and the Virgin Islands which he deems necessary for national defense.

(b) Nothing in this Act shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of the lands conveyed pursuant to section 1 of this Act and the navigable waters overlying such lands, for the purposes of navigation or flood control or the production of power, or shall

be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power.

(c) The United States retains all of its navigational servitude and rights in and powers of regulation and control of the lands conveyed pursuant to section 1 of this Act and the navigable waters overlying such lands, for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources not in derogation of United States navigational servitude and rights which are specifically conveyed to the governments of Guam, the Virgin Island, or American Samoa, as the case may be, pursuant to section 1 of this Act.

Sec. 4. (a) Except as otherwise provided in this section, the governments of Guam, the Virgin Islands, and American Samoa, as the case may be, shall have concurrent jurisdiction with the United States over parties found, acts performed, and offenses permitted on property owned, reversed, or controlled by the United States in Guam, the Virgin Islands, and American Samoa. A judgment of conviction or acquittal on the merits under the laws of Guam, the Virgin Islands, or American Samoa shall be a bar to any prosecution under the criminal laws of the United States for the same act or acts, and a judgment of conviction or acquittal on the merits under the laws of the United States shall be a bar to any prosecution under the laws of Guam, the Virgin Islands, or American Samoa for the same act or acts.

(b) Notwithstanding the provisions of subsection (a) of this section, the President may from time to time exclude from the concurrent jurisdiction of the government of Guam persons found, acts performed, and offenses

committed on the property of the United States which is under the control of the Secretary of Defense to such extent and in such circumstances as he finds required in the interest of the national defense.

Approved November 20, 1963.

TITLE 48 U.S. CODE ANNOTED

CHAPTER 15—CONVEYANCE OF SUBMERGED LANDS TO TERRITORIES

Sec.

1701 to 1703. Repealed.

1704. Concurrent jurisdiction; exceptions for national defense purposes.

1705. Tidelands, submerged lands, or filled lands.

- (a) Conveyance to Guam, Virgin Islands and American Samoa.
- (b) Retention of certain lands and mineral rights by United States.
- (c) Submittal to Congressional Committees of proposals for conveyance of retained lands or rights.
- (d) Oil, gas, and other mineral deposits in submerged lands conveyad to Guam, Virgin Islands, and American Samoa; conveyance by United States; existing leases, permits, etc.

1706. Reserved rights.

- (a) Establishment of naval defense sea areas and airspace reservation.
- (b) Navigation; flood control; power production.
- (c) Navigational servitude and powers of regulation for purposes of commerce, navigation, national defense, and international affairs.
- (d) Status of lands beyond three-mile limit.

1707. Payment of rents, royalties, and fees to local government.

1708. Discrimination prohibited in rights of access to, and benefits from, conveyed lands.

§§ 1707 to 1703. Repealed. Pub.L. 93-435, § 5, Oct. 5, 1974, 88 Stat. 1212

§ 1704. Concurrent jurisdiction; exceptions for national defense purposes

(a) Except as otherwise provided by law, the governments of the Virgin Islands, Guam, and American Samoa, shall have concurrent civil and criminal jurisdiction with the United States with regard to property owned, reserved, or controlled by the United States in the Virgin Islands, Guam, and American Samoa respectively. A judgment of conviction or acquittal on the merits under the laws of Guam, the Virgin Islands, or American Samoa shall be a bar to any prosecution under the criminal laws of the United States for the same act or acts, and a judgment of conviction or acquittal on the merits under the laws of the United States shall be a bar to any prosecution under the laws of Guam, the Virgin Islands, or American Samoa for the same act or acts.

(b) Notwithstanding the provisions of subsection (a) of this section, the President may from time to time exclude from the concurrent jurisdiction of the government of Guam persons found, acts performed, and offense committed on the property of the United States which is under the control of the Secretary of Defense to such extent and in such circumstances as he finds required in the interest of the national defense.

Pub.L. 88-183, § 4, Nov. 20, 1963, 77 Stat. 339; Pub.L. 99-396, § 3, Aug. 27, 1986, 100 Stat. 839.)

§ 1705. Tidelands, submerged lands, or filled lands

(a) Conveyance to Guam, Virgin Islands, and American American Samoa

Subject to valid existing rights, all right, title, and interest of the United States in lands permanently or

periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines of the territories of Guam, the Virgin Islands, and American Samoa, as heretofore or hereafter modified by accretion, erosion, and reliction, and in artificially made, filled in, or reclaimed lands which were formerly permanently or periodically covered by tidal waters, are hereby conveyed to the governments of Guam, the Virgin Islands, and American Samoa, as the case may be, to be administered in trust for the benefit of the people thereof.

(b) Retention of certain lands and mineral rights by United States

There are excepted from the transfer made by subsection (a) hereof—

(i) all deposits of oil, gas, and other minerals, but the term “minerals” shall not include coral, sand, and gravel;

(ii) all submerged lands adjacent to property owned by the United States above the line of mean high tide;

(iii) all submerged lands adjacent to property above the line of mean high tide acquired by the United States by eminent domain proceedings, purchase, exchange, or gift, after October 5, 1974, as required for completion of the Department of Navy Land Acquisitions Project relative to the construction of the ammunition Pier authorized by the Military Construction Authorization Act, 1971 (84 Stat. 1204), as amended by section 201 of the Military Construction Act, 1973 (86 Stat. 1135);

(iv) all submerged lands filled in, built up, or otherwise reclaimed by the United States, before October 5, 1974, for its own use;

(v) all tracts or parcels of submerged land containing on any part thereof any structures or improvements constructed by the United States;

(vi) all submerged lands that have heretofore been determined by the President or the Congress to be of such scientific, or historic character as to warrant preservation and administration under the provisions of sections 1 and 2 to 4 of Title 16;

(vii) all submerged lands designated by the President within one hundred and twenty days after October 5, 1974;

(viii) all submerged lands that are within the administrative responsibility of any agency or department of the United States other than the Department of the Interior;

(ix) all submerged lands lawfully acquired by persons other than the United States through purchase, gift, exchange, or otherwise;

(x) all submerged lands within the Virgin Islands National Park established by sections 398 to 398b of Title 16, including the lands described in sections 398c and 398d of Title 16; and

(xi) all submerged lands within the Buck Island Reef National Monument as described in Presidential Proclamation 3448 dated December 28, 1961.

Upon request of the Governor of Guam, the Virgin Islands, or American Samoa, the Secretary of the Interior may, with or without reimbursement, and subject to the procedure specified in subsection (c) of this section convey all right, title, and interest of the United States in any of the lands described in clauses (ii), (iii), (iv), (v), (vi), (vii), or (viii) of this subsection to the government of Guam, the Virgin Islands, or American Samoa, as the case may be, with the concurrence of the agency having custody thereof.

(c) Submittal to Congressional Committees of proposals for conveyance of retained lands or rights

No conveyance shall be made by the Secretary pursuant to subsection (a) or (b) of this section until the expira-

tion of sixty calendar days (excluding days on which the House of Representatives or the Senate is not in session because of an adjournment of more than three days to a day certain) from the date on which the Secretary of the Interior submits to the Committees on Interior and Insular Affairs of the House of Representatives and the Senate an explanatory statement indicating the tract proposed to be conveyed and the need therefor, unless prior to the expiration of such sixty calendar days both committees inform the Secretary that they wish to take no action with respect to the proposed conveyance.

- (d) Oil, gas, and other mineral deposits in submerged lands conveyed to Guam, Virgin Islands, and American Samoa; conveyance by United States; existing leases, permits, etc.

(1) The Secretary of the Interior shall, not later than sixty days after March 12, 1980, convey to the governments of Guam, the Virgin Islands, and American Samoa, as the case may be, all right, title, and interest of the United States in deposits of oil, gas, and other minerals in the submerged lands conveyed to the government of such territory by subsection (a) of this section.

(2) The conveyance of mineral deposits under paragraph (1) of this subsection shall be subject to any existing lease, permit, or other interest granted by the United States prior to the date of such conveyance. All rentals, royalties, or fees which accrue after such date of conveyance in connection with any such lease, permit, or other interest shall be payable to the government of the territory to which such mineral deposits are conveyed.

(Pub.L. 93-435, § 1, Oct. 5, 1974, 88 Stat. 1210; Pub.L. 96-205, Title VI, § 607, Mar. 12, 1980, 94 Stat. 91.)

§ 1707. Payment of rents, royalties, and fees to local government

On and after October 5, 1974, all rents, royalties, or fees from leases, permits or use rights, issued prior to October 5, 1974, by the United States with respect to the land conveyed by this Act, or by the amendment made by this Act, and rights of action for damages for trespass occupancies of such lands shall accrue and belong to the appropriate local government under whose jurisdiction the land is located.

(Pub.L. 93-435, § 4, Oct. 5, 1974, 88 Stat. 1212.)

§ 1708. Discrimination prohibited in rights of access to, and benefits from, conveyed lands

No person shall be denied access to, or any of the benefits accruing from, the lands conveyed by this Act, or by the amendment made by this Act, on the basis of race, religion, creed, color, sex, national origin, or ancestry: *Provided, however,* That this section shall not be construed in derogation of any of the provisions of the April 17, 1900 cession of Tutuila and Aunuu or the July 16, 1904 cession of the Manu's Islands, as ratified by the Act of February 20, 1929 (45 Stat. 1253) and the Act of May 22, 1929 (46 Stat. 4).

(Pub.L. 93-435, § 6, Oct. 5, 1974, 88 Stat. 1212.)

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THE WEST INDIAN COMPANY LIMITED

March 16, 1979

G.P.O. Box 7660
Charlotte Amalie
St. Thomas
U.S. Virgin Islands 00801
Telephone: (809) 774-1780

The Honorable Juan Luis
Governor
Government of the Virgin Islands
St. Thomas, Virgin Islands

Dear Governor Luis:

I enclose for your information a statement of our position relative to the Coastal Zone Management Act enacted in December 1978, as it relates to the Memorandum of Understanding of October 1973, between the Government of the Virgin Islands, the U.S. Department of the Interior, the West Indian Company, Ltd., Major Byers' Investment Associates and Caribbean Harbor Club, Inc.

We have taken the liberty of sending a copy of these documents to Commissioner Darlan Brin and to the Legislature.

We shall be pleased to meet with you to further consider this matter.

Respectfully,

/s/ Klavs R. Thomsen
KLAVS R. THOMSEN
President

Enc.

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THE WEST INDIAN COMPANY LIMITED

March 16, 1979

G.P.O. Box 7660
Charlotte Amalie
St. Thomas
U.S. Virgin Islands 00801
Telephone: (809) 774-1780

The Honorable Elmo D. Roebuck
Senate President
Legislature of the Virgin Islands
St. Thomas, Virgin Islands

Dear Senator Roebuck:

I enclose for your information a statement of our position relative to the Coastal Zone Management Act enacted in December 1978, as it relates to the Memorandum of Understanding of October 1973, between the Government of the Virgin Islands, the U.S. Department of the Interior, The West Indian Company, Ltd., Major Byers' Investment Associates and Caribbean Harbor Club, Inc.

We have taken the liberty of sending a copy of these documents to each senator as well as to Commissioner Darlan Brin.

We shall be pleased to meet with you to further consider this matter.

Respectfully,

/s/ Klavs R. Thomsen
KLAVS R. THOMSEN
President

Enc.

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IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

THE WEST INDIAN COMPANY LIMITED,
Plaintiff

-vs-

THE GOVERNMENT OF THE VIRGIN ISLANDS,
Defendant

COMPLAINT

Plaintiff, by its attorneys, alleges on information and belief as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff (hereinafter "WICO") is a corporation organized and existing under the laws of the Virgin Islands.

2. Defendant (the "Government") is the Government of the Virgin Islands.

3. In 1913, the Government of Denmark granted to WICO substantial rights to reclaim and fill submerged lands in St. Thomas Harbor.

4. The reclaiming rights of WICO were specifically guaranteed in the 1917 Treaty between the United States and Denmark relating to the acquisition of the Virgin Islands.

5. In 1968 the United States commenced an action captioned "United States of America v. The West Indian Company Limited, et al.," Civil No. 337/1968, District Court of the Virgin Islands, Division of St. Thomas and St. John, seeking a determination that the reclaiming

rights granted to WICO by the Danish Government had terminated.

6. Settlement negotiations were undertaken, in the course of which WICO made a formal written settlement proposal to the Governor of the Virgin Islands, which proposal was the subject of extensive review by various departments and agencies of the Government of the Virgin Islands, and was also the subject of a public hearing ordered by the Governor of the Virgin Islands.

7. On October 11, 1972 the Legislature of the Virgin Islands enacted Act No. 3326, Ninth Legislature of the Virgin Islands of the United States, Fourth Session, 1972, which was approved by the Governor of the Virgin Islands on October 30, 1972, and which provides in full as follows:

“WHEREAS the United States has instituted an action in the District Court of the Virgin Islands, captioned ‘United States of America vs The West Indian Company, et al., Civil No. 337—1968 To Quiet Title’; and

WHEREAS there has been an offer of settlement and compromise put forward by the West Indian Company; and

WHEREAS the offer of settlement and compromise has been the subject of extensive study, investigation and consideration by the Government of the Virgin Islands, acting through the Legislature and the Governor; and

WHEREAS it appears that the offer of settlement and compromise is in the public interest; and

WHEREAS the District Court Judge has recommended consideration of the settlement offer by the Governor and Legislature of the Virgin Islands; Now, Therefore,

BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. The Governor of the Virgin Islands in behalf of the Government of the Virgin Islands shall recommend to the United States Department of Interior and the United States Department of Justice the acceptance and implementation of an offer of settlement and compromise substantially in the form presented by The West Indian Company in *Statement of The West Indian Company re Proposal for Reclaiming Part of Long Bay Under Its Danish Concession*, dated October 26, 1971, as modified by letter from The West Indian Company to Governor Melvin H. Evans, dated November 2, 1971; provided that the West Indian Company will deed to the Government of the Virgin Islands a waterfront highway in front of its proposed development at Frederiksberg Point, in the event such development is undertaken and completed; and provided further that the West Indian Company shall stipulate the period of time within which such Frederiksberg Point development will be undertaken.

Thus passed by the Legislature of the Virgin Islands on October 11, 1972."

Said Act No. 3326 was approved by the Governor of the Virgin Islands on October 30, 1972.

8. Thereafter, a Memorandum of Understanding dated as of the 3rd day of October, 1973 was executed by the United States Department of Interior, the Government of the Virgin Islands, WICO and the other parties to the action referred to in paragraph 5 hereof. (A copy of said Memorandum of Understanding is annexed hereto as Exhibit A and incorporated herein as if set forth in full.)

9. A First Addendum to the Memorandum of Understanding was made and executed as of the 28th day of

October, 1975 between United States Department of Interior, the Government of the Virgin Islands, WICO and the other parties. (A copy of said First Addendum is annexed hereto as Exhibit B and incorporated herein as if set forth in full.) Among other things, the First Addendum provided for the transfer to the Government of the Virgin Islands of the rights and responsibilities of the Government of the United States under the Memorandum of Understanding.

10. The Memorandum of Understanding, as amended, requires the Government of the Virgin Islands to convey to WICO all of the Government's right, title and interest in certain areas to be reclaimed by WICO, therein designated as Areas IV, V, VI and VII. The Government reserved the right to acquire the lands or rights of WICO which are subject to the agreement by eminent domain or condemnation, but not otherwise.

11. The Government enacted Act No. 4248, Twelfth Legislature of the Virgin Islands of the United States, passed by the Legislature of the Virgin Islands on October 12, 1978 and approved by the Governor of the Virgin Islands on October 31, 1978 (the "Virgin Islands Coastal Zone Management Act of 1978").

12. The Virgin Islands Coastal Zone Management Act of 1978, and particularly Section 910 thereof, forbids the conveyance of title to submerged lands (permitting only occupancy permits or leases for a maximum of 20 years, for a rental fee), and purports to impose rigorous use restrictions and other conditions, all of which are contrary to the terms and intention of the Memorandum of Understanding, as amended, and would prevent the conveyance to WICO by the Government of the submerged lands in Areas IV, V, VI and VII, as required by the Memorandum of Understanding, as amended.

13. The actions of the Government alleged in paragraphs 11 and 12 constitute a material breach by the

Government of the Virgin Islands of the Memorandum of Understanding, as amended.

14. The value of the rights and interests of WICO under the Memorandum of Understanding, as amended, is in excess of \$5,000,000, and WICO has suffered damages in excess of \$5,000,000 by reason of such material breach of contract by the Government.

AS AND FOR A SECOND CAUSE OF ACTION

15. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 12.

16. Said actions on the part of the Government constitute a taking of property without compensation and are in violation of the Fifth Amendment to the Constitution of the United States and of § 3 of the Revised Organic Act of 1954, as amended.

RELIEF REQUESTED

17. As and for its damages in respect of the First Cause of Action, plaintiff is entitled to damages in a sum in excess of \$5,000,000, with interest.

18. With respect to the Second Cause of Action, plaintiff is entitled to judgment declaring the Coastal Zone Management Act to be unconstitutional, unlawful and void.

WHEREFORE, etc.

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[Gov't Logo]

GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES

Department of Conservation and Cultural Affairs

P.O. Box 4340

Charlotte Amalie, St. Thomas

NOTICE OF VIOLATION AND
ORDER TO CEASE AND DESIST

Date: August 18, 1986

Case: _____

CERTIFIED MAIL OR
HAND DELIVERY

Mr. Hans F. Jahn, President
West Indian Company, Ltd.
G.P.O. Box 7660
St. Thomas, Virgin Islands

Coastal Zone Permit
CZT-89-83W

Dear Mr. Jahn:

It has been reported that you are responsible for the continued work pursuant to CZT-89-83W in violation of Bill No. 16-0607, dated August 11, 1986 which requires the Governor's approval and the Legislature's ratification located on the submerged lands of Long Bay on St. Thomas, U.S. Virgin Islands.

This is to notify you that the above referenced action is in violation of Bill No. 16-0607 and Chapter 21 of Title 12, Virgin Islands Code.

You are hereby ordered to immediately cease and desist from any further action resulting in a violation. The following corrective action is to be taken: Meet with the Director of CZM to determine the extent of further work

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necessary in order to protect the environment and perform such work strictly under his guidance; and comply with Bill No. 16-0607.

/s/ Angel Luis Lebron
Commissioner

Received by: /s/ [Illegible]

Firm: [Illegible]

Date: [Illegible]

cc: Asst. Attorney General, DCCA
Deputy District Engineer, Corps of Engineers,
San Juan
Director, CZM
Chief of Enforcement

COASTAL ZONE MANAGEMENT ACT
TITLE 12 V.I. CODE

Chapter 21. Virgin Islands Coastal Zone Management

Section Analysis

- 901. Common name
- 902. Definitions
- 903. Findings and goals
- 904. Coastal Zone Management Commission
- 905. General provisions
- 906. Specific policies applicable to the first tier of the coastal zone
- 907. The Coastal Land and Water Use Plan
- 908. Coastal zone boundary maps
- 909. Areas of particular concern
- 910. Coastal zone permit
- 911. Additional requirements for development or occupancy of trust lands or other submerged or filled lands
- 912. Planning program
- 913. Enforcement, penalties and judicial review
- 914. Board of Land Use Appeals

§ 901. Common name

This chapter shall be known and may be cited as the Virgin Islands Coastal Zone Management Act of 1978.— Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 282.

§ 902. Definitions

For the purposes of this chapter, and unless the context otherwise requires:

(a) “Aggrieved person” means any person, including the applicant, who, in connection with a decision or action of the Commission on an application for a major

coastal zone permit either appeared in person or through representatives at a public hearing of the Commission on said application, or prior to said decision or action informed the Commission in writing of the nature of his concern, or on an application for a minor coastal zone permit informed the Commissioner in writing prior to said decision or action of the nature of his concern, or who for good cause was unable to do any of the foregoing.

(b) "Areas of particular concern" means areas in the coastal zone that require special and more detailed planning analyses and the preparation of special plans and implementation mechanism.

(c) "Board" means the Board of Land Use Appeals established in Title 29, chapter 3 of this Code.

(d) "Coastal dependent development or use" means any development or use which requires a site on, or adjacent to, the sea to be able to function effectively.

(e) "Coastal Land and Water Use Plan" means the comprehensive plan for the development of the first tier of the coastal zone which is intended to serve as a policy guide for decision-making relative to development activities within this tier.

(f) "Coastal waters" means sea, as that term is defined in subsection (x) herein, as well as those waters adjacent to the shorelines which contain a measurable quantity or percentage of seawater, including, but not limited to, sounds, bays, lagoons, bayous, ponds and estuaries.

(g) "Coastal zone" means all land and water areas of the Territory of the Virgin Islands extending to the outer limits of the territorial sea, specified on the maps identified in section 908, subsection (a) of this chapter, and is composed of two parts, a first tier and a second tier.

(h) "Coastal Zone Management Program" means the program prepared by the Virgin Islands Planning Office

for the management of the Coastal Zone of the Virgin Islands and submitted by the Governor of the Virgin Islands to the U.S. Department of Commerce pursuant to section 306, subsection (c), paragraph 4 of the Federal Coastal Zone Management Act of 1972 (P.L. 92-583).

(i) "Coastal zone permit" means a permit for any development within the first tier of the coastal zone that is required pursuant to section 906 of this chapter.

(j) "Commission" means the Coastal Zone Management Commission as created by section 904 of this chapter.

(k) "Commissioner" means the Commissioner of Conservation and Culutral Affairs.

(l) "Development" means the placement, erection, or removal of any fill, solid material or structure on land, in or under the water; discharge or disposal of any dredged material or of any liquid or solid waste; grading, removing, dredging, mining, or extraction of any materials, including mineral resources; subdivision of land pursuant to Title 29, chapter 3 of this Code; construction, reconstruction, removal, demolition or alteration of the size of any structure; or removal or harvesting of vegetation, including coral. Development shall not be defined or interpreted to include activities related to or undertaken in conjunction with the cultivation, use or subdivision of land for agricultural purposes which do not disturb the coastal waters or sea, or any improvement made in the interior of any structure.

(m) "Emergency" means an unexpected situation that poses an immediate danger to life, health or property and demands immediate action to prevent or mitigate loss or damage to life, health, property or essential public services.

(n) "Environment" means the physical, social and economic conditions which exist within the area which will be affected by a proposed project.

(o) "Environmental Assessment Report" means an informational report prepared by the permittee available to public agencies and the public in general which, when required by this chapter, shall be considered by the Commission prior to its approval or disapproval of an application for a major coastal zone permit. Such report shall include detailed information about the existing environment in the area of a proposed development, and about the effects which a proposed development is likely to have on the environment; an analysis and description of ways in which the significant adverse effects of such development might be mitigated and minimized; and an identification and analysis of reasonable alternatives to such development.

(p) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

(q) "Fill" means earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area.

(r) "First tier" means that area extending landward from the outer limit of the territorial sea, including all offshore islands and cays, to distances inland as specified in the maps incorporated by reference in section 908, subsection (a) of this chapter.

(s) "Major coastal zone permit" means a permit required for development within the coastal zone, which development is not "minor development" as defined in section 910, subsection (c) of this chapter.

(t) "Minor coastal zone permit" means the permit required for development defined in section 910, subsection (c) of this chapter.

(u) "Permit" means any license, certificate, approval, or other entitlement for use granted or denied by any public agency.

(v) "Person" means any individual, organization, partnership, association, corporation or other entity, including any utility, the Government of the Virgin Islands, the Government of the United States, any department, agency, board, authority or commission of such governments, including specifically the Virgin Islands Port Authority and the Virgin Islands Water and Power Authority, and any officer or governing or managing body of any of the foregoing.

(w) "Public Agency" means Government of the United States, the Government of the Virgin Islands or any department, agency, specifically the Virgin Islands Port Authority and the Virgin Islands Water and Power Authority, and any officer or governing or managing body of any of the foregoing.

(x) "Sea" means the Atlantic Ocean, the Caribbean Sea and all coastal waters including harbors, bays, coves, channels, estuaries, salt ponds, marshes, sloughs and other areas subject to tidal action through any connection with the Atlantic Ocean or the Caribbean Sea, excluding streams, tributaries, creeks and flood control and drainage channels.

(y) "Second tier" means the interior portions of the Islands of St. Thomas, St. John and St. Croix, including all watersheds and adjacent land areas not included in the first tier.

(z) "Shorelines" means the area along the coastline of the Virgin Islands from the seaward line of low tide, running inland a distance of fifty feet, or to the extreme seaward boundary of natural vegetation which spreads continuously inland, or to a natural barrier, whichever is the shortest distance. Whenever the shore is extended into the sea by or as a result of filling, dredging or other man-made alteration activities, the landward boundary of the shorelines shall remain at the line previously established.

(aa) "Significant natural area" means land and/or water areas within the coastal zone of major environmental value, including fish or wildlife habitat areas, valuable biological or natural productivity areas; and unique or fragile coastal ecological units or ecosystems which require special treatment and protection.

(bb) "Structure" means anything constructed or erected which requires location or placement on or in the ground, the submerged land, or coastal waters, or which is attached to something located in or on the ground, the submerged lands, or coastal waters.

(cc) "Submerged and filled lands" means all lands in the Virgin Islands permanently or periodically covered by tidal waters up to, but not above, the line of mean high tide, seaward to a line three geographical miles distant from the coastline of the Virgin Islands, and all artificially made, filled in, or reclaimed lands, salt ponds and marshes which were formerly permanently or periodically covered by tidal waters.

(dd) "Trust lands" means all submerged and filled land conveyed pursuant to Public Law 93-435, 88 Statutes 1210, by the United States to the Government of the Virgin Islands to be administered in trust for the benefit of the people of the Virgin Islands.

(ee) "Vested rights" means the rights obtained by a person to complete development without having to obtain a coastal zone permit where, prior to the effective date of this chapter, such person has obtained the necessary permit or permits, issued by the appropriate public agency(ies), which would have been sufficient to legally authorize such development prior to said effective date.—
Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 282.

§ 903. Findings and goals

(a) The Legislature hereby finds and declares that:

(1) the coastal zone, and the lands and waters thereof, constitute a distinct and valuable natural resource of vital importance to the people and economy of the Virgin Islands;

(2) the protection of the natural and scenic resources of the coastal zone is of vital concern to present and future residents of the Virgin Islands;

(3) title to certain submerged and filled lands surrounding the Virgin Islands has been conveyed in trust to and is held in trust by the Government of the Virgin Islands for the benefit of the people of the Virgin Islands;

(4) the shorelines provide a constant source of food and recreation to, and enhance all aspects of the lives of, the people of the Virgin Islands, and the public has made frequent uninterrupted and unobstructed use of the shorelines throughout Danish and American sovereignty;

(5) to promote the public safety, health and welfare, and to protect public and private property, wildlife, ocean resources and the natural environment, it is necessary to preserve the ecological balance of the coastal zone, and to prevent its deterioration and destruction;

(6) there has been uncontrolled and uncoordinated development of the shorelines and attempts to curtail the use of the shorelines by the public;

(7) improper development of the coastal zone and its resources has resulted in land use conflicts, erosion, sediment deposition, increased flooding, gut and drainage fillings, decline in productivity of the marine environment, pollution and other adverse environmental effects in and to the lands and waters of the coastal zone, and has adversely affected the beneficial uses of the coastal zone by the people of the Virgin Islands;

(8) the present system of regulatory controls in the Virgin Islands affecting the coastal zone consists of frag-

mented or overlapping laws and regulations which are not properly coordinated and which when taken together do not constitute a comprehensive or adequate response to the needs of the people of the Virgin Islands to protect, and to effect the best use of, the resources of the coastal zone; and

(9) there exists no comprehensive program for the overall management, conservation and development of the resources of the coastal zone, for the prevention of encroachment on natural areas in the coastal zone by urbanized developments and for the avoidance of irreversible commitments of coastal zone resources which provide short-term benefits at the cost of adverse effects on the long-term productivity and amenity of the coastal zone environment.

(b) The Legislature hereby determines that the basic goals of the Virgin Islands for its coastal zone are to:

(1) protect, maintain, preserve and, where feasible, enhance and restore, the overall quality of the environment in the coastal zone, the natural and man-made resources therein, and the scenic and historic resources of the coastal zone for the benefit of residents of and visitors of the Virgin Islands;

(2) promote economic development and growth in the coastal zone and consider the need for development of greater than territorial concern by managing: (1) the impacts of human activity and (2) the use and development of renewable and nonrenewable resources so as to maintain and enhance the long-term productivity of the coastal environment;

(3) assure priority for coastal-dependent development over other development in the coastal zone by reserving areas suitable for commercial uses including hotels and related facilities, industrial uses including port and marine facilities, and recreation uses;

(4) assure the orderly, balanced utilization and conservation of the resources of the coastal zone, taking into account the social and economic needs of the residents of the Virgin Islands;

(5) preserve, protect and maintain the trust lands and other submerged and filled lands of the Virgin Islands so as to promote the general welfare of the people of the Virgin Islands;

(6) preserve what has been a tradition and protect what has become a right of the public by insuring that the public, individually and collectively, has and shall continue to have the right to use and enjoy the shorelines and to maximize public access to and along the shorelines consistent with constitutionally-protected rights of private property owners;

(7) promote and provide affordable and diverse public recreational opportunities in the coastal zone for all residents of the Virgin Islands through acquisition, development and restoration of areas consistent with sound resource conservation principles;

(8) conserve ecologically significant resource areas for their contribution to marine productivity and value as wildlife habitats, and preserve the function and integrity of reefs, marine meadows, salt ponds, mangroves and other significant natural areas:

(9) maintain or increase coastal water quality through control of erosion, sedimentation, runoff, siltation and sewage discharge;

(10) consolidate the existing regulatory controls applicable to uses of land and water in the coastal zone into a single unified process consistent with the provisions of this chapter, and coordinate therewith the various regulatory requirements of the United States Government;

(11) promote public participation in decisions affecting coastal planning conservation and development.—
Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 286.

§ 904. Coastal Zone Management Commission

(a) There is hereby created within the Department of Conservation and Cultural Affairs a Coastal Zone Management Commission composed of the Commissioner of Conservation and Cultural Affairs, who shall be a non-voting member, ex officio, the Director of the Virgin Islands Planning Office who shall be a non-voting member, ex officio, and fifteen other members appointed by the Governor with the advice and consent of the Legislature. Of the fifteen appointed members, five shall reside on St. Croix, five shall reside on St. Thomas and five shall reside on St. John. Ex officio members of the Commission may appoint a designee to serve at his or her pleasure who shall have all the powers and duties of such member pursuant to this chapter. The Commission shall elect a Chairman from among its members. Eight voting members of the Commission shall constitute a quorum for the transaction of all business of the Commission. A majority of those voting members present shall decide on all matters before the Commission. The Commission may adopt such other rules as it deems necessary to conduct its business.

(b) There are created within the Coastal Zone Management Commission three Commission Committees: one of such Committees shall consist of the members who reside on St. Croix, one of such Committees shall consist of the members who reside on St. Thomas and one of such Committees shall consist of members who reside on St. John. Each Committee shall exercise the full authority of the Commission over the issuance of Coastal Zone Permits within the jurisdiction of the Commission pertaining solely to the respective resident island of the Committee. Each Committee shall elect a Chairman from its members. A quorum of each Coastal Zone Manage-

ment Committee shall consist of three of its members. A majority of those present shall decide on all matters before a Commission Committee.

(c) Appointed members of the Commission shall serve a term of two years and may be reappointed. Upon the conclusion of the term of any appointed member of the Commission, such person shall continue to serve until a new member has been appointed. The appointed members of the Commission shall receive the sum of \$30 for each day or part thereof spent in the performance of their duties. Every member of the Commission shall be reimbursed for necessary travel, subsistence and other expenses actually incurred in the discharge of his duties as a member of the Commission. Appointed members of the Commission may be removed by the Governor for cause.

(d) In addition to all powers specifically assigned the Commission by this chapter, the Commission shall have the primary responsibility for the implementation of the provisions of this chapter. The Department of Conservation and Cultural Affairs as directed by the Commission is hereby designated as the territorial coastal zone management agency for the purpose of exercising powers set forth in the Federal Coastal Zone Management Act of 1972 or any amendment thereto or any other federal act heretofore or hereafter enacted that relates to the management of the coastal zone except for those activities or programs presently being carried out by any other agency of the Government of the Virgin Islands or which the Governor may assign to any other agency. In addition to other authority, the Commission may grant or issue any certificate or statement required pursuant to any federal law that an activity of any person is in conformity with the provisions of this chapter.

(e) The Commission shall prepare and submit to the Legislature of the Virgin Islands for adoption any additional plans and undertake any studies it deems neces-

sary and appropriate to better accomplish the purposes, goals and policies of this chapter.

(f) The Commission shall evaluate progress being made towards the implementation of the provisions of this chapter and shall submit a report to the Governor and Legislature on an annual basis.

(g) The Commission shall promulgate rules and regulations necessary to carry out the provisions of this chapter; Provided, however, That no such rules or regulations shall be promulgated unless public hearings are held by the Commission after appropriate notice as hereinafter provided. Any rules and regulations promulgated pursuant to this chapter may be modified, amended or revised by the Legislature in accordance with the provisions of subsection (b), section 913, Title 3 of this Code.

(h) *Division of Coastal Zone Management.* There is hereby established within the Department of Conservation and Cultural Affairs a Division of Coastal Zone Management, the powers and duties of which are, without limitation, to assist the Commission and Commissioner in administering and enforcing the provisions of this chapter.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 289.

§ 905. General provisions

(a) Nothing in this chapter shall be construed as amending or altering in any way the existing zoning designations of lands within the Virgin Islands or the Zoning District Maps adopted pursuant to Title 29, chapter 3, of this Code.

(b) Every use permitted under an existing zoning designation of lands pursuant to sections 227 and 228, Title 29, chapter 3, of this Code shall be permitted provided the use is consistent with the provisions of sections 903, 906 and 910 of this chapter.

(c) Any proposed use for which a coastal zone permit is required but not permitted pursuant to sections 227 and 228, Title 29, chapter 3, of this Code, and is consistent with the applicable zoning district and goals and policies of this chapter may be approved by the authority responsible for issuing such permits.

(d) This chapter is not intended, and shall not be construed as authorizing the Commission, Commissioner or any public agency acting pursuant to this chapter to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use without the payment of just compensation therefor. This chapter is not intended to increase or decrease the rights of any owner of property under the Revised Organic Act of the Virgin Islands or Constitution of the United States.

(e) In carrying out the provisions of this chapter, conflicts between the policies of this chapter shall be resolved in the manner which is the most protective of significant coastal resources.

(f) No provision of this chapter is a limitation on any of the following:

(1) except as otherwise specifically limited by territorial or federal law, on the power of any public agency to adopt and enforce additional regulations, not in conflict with this chapter, imposing further conditions or restrictions on land or water uses or other activities which might adversely affect coastal zone resources;

(2) on the power of the Government of the Virgin Islands to declare, prohibit and abate nuisances or to bring an action in the name of the people of the Virgin Islands to enjoin any waste or the pollution of resources of the coastal zone; and

(3) on the right of any person to maintain an appropriate action for relief against a private nuisance or for any other private relief.

(g) Nothing herein contained shall be construed to abridge or alter vested rights obtained in a development in the first tier coastal zone prior to the effective date of this chapter or any occupancy permit or lease of trust lands or other submerged or filled lands issued prior to the effective date of this chapter, except to the extent provided in said occupancy permit or lease.

(h) No person who has obtained all necessary and required permits to construct or undertake development in the coastal zone and who, prior to the effective date of this chapter, has commenced construction of such development in good faith, shall be required to secure approvals for such development pursuant to this chapter; Provided, however, That notwithstanding subsections (g) and (h) of this section, no substantial change may be made in any such development without prior approval having been obtained in accordance with the provisions of this chapter.

(i) Nothing herein contained shall be construed to repeal, alter, abrogate, annul or in any way limit, diminish, impair or interfere with any of the following, but shall be held and construed as auxilliary and supplementary thereto:

(1) any easements, covenants or other agreements between parties to the extent that such easements, covenants, or agreements impose greater restrictions upon the use or alteration of land or water in the coastal zone than the requirements of this chapter;

(2) any or all rights the public has acquired by whatever means to use, traverse, enjoy or occupy lands or waters or both in the coastal zone as of the effective date of this chapter by reason of express or implied dedication or otherwise;

(3) the Commissioner's authority to administer and enforce any other provision of law related to, involving or affecting the coastal zone; and

(4) any laws of the Virgin Islands relating to air or water quality, air or water pollution, oil spill prevention or earth change.

(j) All public agencies of the Government of the Virgin Islands shall cooperate with the Commission, its Committees, and Commissioner in the administration and the enforcement of this chapter. All public agencies of the Government of the Virgin Islands currently exercising regulatory authority in the coastal zone shall administer such authority consistent with the provisions of this chapter and the rules and regulations promulgated hereunder.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 291.

§ 906. Specific policies applicable to the first tier of the coastal zone

Consistent with the basic goals set forth in section 903(b) of this chapter, and except as may otherwise be specifically provided in this chapter, the policies set forth in this section shall apply to all proposed developments in the first tier of the coastal zone, and no such development shall be approved which is inconsistent with such goals and policies.

(a) Development policies in the first tier shall be as follows:

(1) to guide new development to the maximum extent feasible into locations with, contiguous with, or in close proximity to existing developed sites and into areas with adequate public services and to allow well-planned, self-sufficient development in other suitable areas where it will have no significant adverse effects, individually or cumulative, on coastal zone resources;

(2) to give highest priority to water dependent uses, particularly in those areas suitable for commercial uses including resort hotels and related facilities, industrial uses including port and marine facilities, and recreation;

to give secondary priority to those uses that are water-related or have special siting needs; and to discourage uses which are neither water-dependent, water-related nor have special siting needs in areas suitable for the highest and secondary priority uses;

(3) to assure that new or expanded public capital improvement projects will be designed to accommodate those needs generated by development or uses permitted consistent with the Coastal Land and Water Use Plan and provisions of this chapter;

(4) to assure that all new subdivisions, in addition to the other requirements contained in this chapter and in the Virgin Islands Zoning and Subdivision Law, are physically suitable for the proposed sites and are designed and improved so as to avoid causing environmental damage or problems of public health.

(5) to encourage waterfront redevelopment and renewal in developed harbors in order to preserve and improve physical and visual access to the waterfront from residential neighborhoods and commercial downtown areas;

(6) to assure that development will be cited and designed to protect views to and along the sea and scenic coastal areas, to minimize the alteration of natural land forms, and to be visually compatible with the character of surrounding areas;

(7) to encourage fishing and carefully monitor mariculture and, to the maximum extent feasible, to protect local fishing activities from encroachment by non-related development;

(8) to assure that dredging or filling of submerged lands is clearly in the public interest; and to ensure that such proposals are consistent with specific marine environment policies contained in this chapter. To these ends, the diking, filling or dredging of coastal waters,

salt ponds, lagoons, marshes or estuaries may be permitted in accordance with other applicable provisions of this chapter only where there are no feasible, less environmentally-damaging alternatives and, where feasible, mitigation measures have been provided to minimize adverse environmental effects, and in any event shall be limited to the following: (i) maintenance dredging required for existing navigational channels, vessel berthing and mooring areas; (ii) incidental public service purposes, including but not limited to the burying of cables and pipes, the inspection of piers and the maintenance of existing intake and outfall lines; (iii) new or expanded port, oil, gas and water transportation, and coastal dependent industrial uses, including commercial fishing facilities, cruise ship facilities, and boating facilities and marinas; (iv) except as restricted by federal law, mineral extraction, including sand, provided that such extraction shall be prohibited in significant natural areas; and (v) restoration purposes;

(9) to the extent feasible, discourage further growth and development in flood-prone areas and assure that development in these areas is so designed as to minimize risks to life and property;

(10) to comply with all other applicable laws, rules, regulations, standards and criteria of public agencies.

(b) Environmental policies in the first tier shall be as follows:

(1) to conserve significant natural areas for their contributions to marine productivity and value as habitats for endangered species and other wildlife;

(2) to protect complexes of marine resource systems of unique productivity, including reefs, marine meadows, salt ponds, mangroves and other natural systems, and assure that activities in or adjacent to such complexes are designed and carried out so as to minimize adverse

effects on marine productivity, habitat value, storm buffering capabilities, and water quality of the entire complex;

(3) to consider use impacts on marine life and adjacent and related coastal environment;

(4) to assure that siting criteria, performance standards, and activity regulations are stringently enforced and upgraded to reflect advances in related technology and knowledge of adverse effects on marine productivity and public health;

(5) to assure that existing water quality standards for all point source discharge activities are stringently enforced and that the standards are continually upgraded to achieve the highest possible conformance with federally-promulgated water quality criteria;

(6) to preserve and protect the environments of off-shore islands and cays;

(7) to accommodate offshore sand and gravel mining needs in areas and in ways that will not adversely affect marine resources and navigation. To this end, sand, rock, mineral, marine growth and coral (including black coral), natural materials, or other natural products of the sea, excepting fish and wildlife, shall not be taken from the shorelines without first obtaining a coastal zone permit, and no permit shall be granted unless it is established that such materials or products are not otherwise obtainable at reasonable cost, and that the removal of such materials or products will not significantly alter the physical characteristics of the area or adjacent areas on an immediate or long-term basis; or unless the Commission has determined that a surplus of such materials or products exists at specifically designated locations;

(8) to assure the dredging and disposal of dredged material will cause minimal adverse effects to marine and wildlife habitats and water circulation;

(9) to assure that development in areas adjacent to environmentally-sensitive habitat areas, especially those of endangered species, significant natural areas, and parks and recreations area, is sited and designed to prevent impacts which would significantly degrade such areas;

(10) to assure all of the foregoing, development must be designed so that adverse impacts on marine productivity, habitat value, storm buffering capabilities and water quality are minimized to the greatest feasible extent by careful integration of construction with the site. Significant erosion, sediment transport, land settlement or environmental degradation of the site shall be identified in the environmental assessment report prepared for or used in the review of the development, or described in any other study, report, test results or comparable documents.

(c) Amentity policies in the first tier shall be as follows:

(1) to protect and, where feasible or appropriate, enhance and increase public coastal recreational uses, areas and facilities;

(2) to protect and enhance the characteristics of those coastal areas which are most valued by the public as amenities and which are scarce, or would be significantly altered in character by development, or which would cause significant environmental degradation if developed;

(3) to preserve agricultural land uses in the coastal zone by encouraging either maintenance of such present agricultural use or use as open-space areas;

(4) to incorporate visual concern into the early stages of the planning and design of facilities proposed by siting in the coastal zone and, to the extent feasible, maintain or expand visual access to the coastline and coastal waters;

(5) to foster, protect, improve, and ensure optimum access to, and recreational opportunities at, the shoreline for all the people consistent with public rights, constitutionally-protected rights of private property owners, and the need to protect natural resources from overuse;

(6) to ensure that development will not interfere with the public's right of access to the sea where acquired through customary use, legislative authorization or dedication, including without limitation the use of beaches to the landward extent of the shoreline;

(7) to require, in the discretion of the appropriate Committee of the Commission, that public access from the nearest public roadway to the shoreline be dedicated in land subdivisions or in new development projects requiring a major coastal zone permit. Factors to be considered in requiring such dedication of public access include (i) whether it is consistent with public safety or protection of fragile coastal zone resources; (ii) whether adequate public access exists nearby; (iii) whether existing or proposed uses or development would be adversely affected; (iv) consideration of the type of shoreline and its appropriate potential recreational, educational, and scientific uses; and (v) the likelihood of trespass on private property resulting from such access and availability of reasonable means for avoiding such trespass. Dedicated accessways shall not be required to be open to public use until a public agency or private association agrees to accept responsibility for providing off-street parking areas and for maintenance and liability of the accessway, shoreline and beach areas. Nothing in this subsection shall be construed as restricting existing public access nor shall it excuse the performance of duties and responsibilities of public agencies as provided by law to acquire or provide access to the shoreline. This provision shall not be construed as requiring free use of private facilities on land adjoining any beach or shoreline but only as requiring access to the beach or shore-

line to the general public as a condition precedent to the grant of a coastal zone permit.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 293.

§ 907. The Coastal Land and Water Use Plan

The Coastal Land and Water Use Plan, identified as Document Numbers LWUP-1-4, inclusive, are hereby approved and shall be implemented. This plan shall be used to the maximum extent feasible as the long-range guide by the Commission, Commissioner, Virgin Islands Planning Office and any other agency of the Government of the Virgin Islands, in reviewing and recommending zoning amendments, capital improvement programs or projects, public land acquisition or disposition, designating areas of particular concern, and other development activities within the first tier of the coastal zone, but excluding development activities requiring a coastal zone permit under section 910 of this chapter. The Coastal Land and Water Use Plan is not intended to change any of the existing zoning district maps, or place any limitations on any of the uses permitted in the zoning districts established pursuant to Title 29, chapter 3, of this Code.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 297.

§ 908. Coastal zone boundary maps

The boundaries and identification of the coastal zone, including the first and second tier established by this chapter, are shown on the Coastal Zone Management Plan Maps, identified as Document Number STCZM-1 to 5, SCCZM-1 to 11, SJCZM-1 to 4, and OICZM-1, inclusive, which are filed in the Office of the Lieutenant Governor (with copies in the offices of the Commissioner and the Virgin Islands Planning Office), and shall be interpreted by the Commissioner. Such maps are hereby declared to be part of this chapter as if fully set forth herein.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 297.

§ 909. Areas of particular concern

The Commission may recommend, after reasonable notice and public hearings, designation of areas of particular concern within the first tier of the coastal zone and submit such recommendations to the Legislature for adoption. In recommending the designation of areas of particular concern, criteria for selection and implementing actions shall be included in a report prepared and adopted by the Commission.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 297.

§ 910. Coastal zone permit

(a) *When required, terms and conditions*

(1) On or after the effective date of this chapter, any person wishing to perform or undertake any development in the first tier of the coastal zone, except as provided in subsection (b) of this section, shall obtain a coastal zone permit in addition to obtaining any other permit required by law from any public agency prior to performing or undertaking any development.

(2) A permit shall be granted for a development if the appropriate Committee of the Commission or the Commissioner, whichever is applicable, finds that (A) the development is consistent with the basic goals, policies and standards provided in sections 903 and 906 of this chapter; and (B) the development as finally proposed incorporates to the maximum extent feasible mitigation measures to substantially lessen or eliminate any and all adverse environmental impacts of the development; otherwise the permit application shall be denied. The applicant shall have the burden of proof to demonstrate compliance with these requirements.

(3) Any coastal zone permit that is issued shall be subject to reasonable terms and conditions imposed by the appropriate Committee of the Commission or the Commissioner, whichever is applicable, in order to en-

sure that such development will be in accordance with the provisions of this chapter. To this end, any of the development provisions in section 229 of Title 29, chapter 3, of this Code may be made more or less restrictive by the appropriate Committee of the Commission in the case of a major coastal zone permit and more restrictive by the Commissioner in the case of a minor coastal zone permit.

(4) In connection with any land subdivision or major coastal zone permit issued for development adjacent to the shoreline, the appropriate Committee of the Commission may require the dedication of an easement or fee interest in land for reasonable public access from public highways to the sea in accordance with section 906, subsection (c), paragraph (7) of this chapter.

(b) When not required or may be waived.

(1) Notwithstanding any provision in this chapter to the contrary, no coastal zone permit shall be required pursuant to this chapter for activities related to the repair or maintenance of an object or facility located in the coastal zone, where such activities shall not result in an addition to, or enlargement or expansion of, such object or facility.

(2) -Where immediate action by a person or public agency performing a public service is required to protect life and public property from imminent danger, or to restore, repair, or maintain public works, utilities or services destroyed, damaged, or interrupted by natural disaster or serious accident, or in other cases of emergency, the requirement of obtaining a permit under this section may be waived by the appropriate Committee of the Commission or the Commissioner upon notification to the Commissioner of the type and location of the work and the name of the person or public agency conducting the work.

(c) *Standards for major and minor coastal zone permits.* A major coastal zone permit shall be issued by the appropriate Committee of the Commission for all approved applications for development except:

(1) a development which is to be conducted completely or substantially seaward of the line of mean high tide and is designated by the appropriate Committee of the Commission pursuant to subsection (e), paragraph (5) of this section; or

(2) a development which is to be conducted completely landward of the line of mean high tide and satisfies one of the following criteria:

(A) the development consists of a subdivision, or the construction of one or two single-family residences or a duplex on any parcel of record on the effective date of this chapter; or

(B) the development consists entirely of improvements to an existing structure, which improvements cost the developer less than fifty-two thousand dollars (\$52,000); or

(C) the development consists of one or more structures valued in their entirety at less than seventy-five thousand dollars (\$75,000); or

(D) the development consists of any other development, except the extraction of minerals, valued at less than sixty-six thousand dollars (\$66,000); or

(E) the development consists of the extraction of minerals valued at less than seventeen thousand dollars (\$17,000). In which case a minor coastal zone permit shall be issued by the Commissioner; Provided, however, That if the Commissioner, upon reviewing any minor permit application submitted pursuant to subsection (d), paragraph (3) of this section, determines that the proposed activity is likely to have significant adverse environmental consequences he shall, upon giving notice to the

applicant, forward such application to the appropriate Committee of the Commission for review as a major coastal zone permit.

(d) *Coastal zone permit procedures.*

(1) Upon submission of any application for a coastal zone permit, which application shall specify the type of permit being sought, the Commissioner shall determine whether such application is complete. If the Commissioner determines that such application is not complete, he shall promptly notify, in no event more than 15 days after receipt thereof, the applicant of the deficiencies in such application.

(2) Upon determination by the Commissioner that an application for a major coastal zone permit is complete, the Commissioner shall promptly transmit a copy thereof to all relevant public agencies for review and comment within thirty days of the receipt thereof, and shall schedule a public hearing to be conducted by the appropriate Committee of the Commission on such application, said hearing to be held within sixty days of the receipt of such completed application.

(3) Upon receipt of an application for a minor coastal zone permit which is deemed complete by the Commissioner, the Commissioner shall promptly give written notice of the filing of such application to any person who requests such notification in writing. In addition, the Commissioner shall give such notice to any person who he determines would be affected by or any person interested in such development. Upon a request from any such person, the Commissioner shall transmit a copy of the application and shall request comments thereon within thirty days thereafter.

(4) The appropriate Committee of the Commission shall act upon a major coastal zone permit application within thirty days after the conclusion of the public hearing required by paragraph (2) of this subsection,

and the Commissioner shall act upon a minor coastal zone permit application within sixty days after receipt thereof. Failure of the appropriate Committee of the Commission or the Commissioner to act within any time limit specified in this paragraph shall constitute an action taken and shall be deemed an approval of any such application. A copy of the decision of the appropriate Committee of the Commission or the Commissioner, whichever is applicable, or an application for a coastal zone permit shall be transmitted in writing to the applicant and to any person who requests a copy thereof.

(5) Any action by the appropriate Committee of the Commission or the Commissioner shall become final after the forty-fifth day following a decision, unless an appeal is filed with the Board of Land Use Appeals within such time. If such an appeal is filed, the operation and effect of the Committee's or the Commissioner's action shall be stayed pending a decision on appeal.

(6) If an application for a permit is denied by the appropriate Committee of the Commission pursuant to subsection (a), paragraph (2) of this section, or by the Board of Land Use Appeals pursuant to section 914 of this chapter, the applicant may submit another application for a coastal zone permit no sooner than one hundred-twenty days after the date of such denial.

(7) Any development approved pursuant to this chapter, including any action by the Board of Land Use Appeals, shall be commenced, performed and completed in compliance with the provisions of the permits for such development granted or issued by the appropriate Committee of the Commission, the Commissioner, the Board of Land Use Appeals or any other public agency. Any development or construction approved by a coastal zone permit shall be commenced within twelve months from the date such permit is issued. Failure to commence development or construction within such period shall cause the permit to lapse and render it null and void unless an

extension is granted by the appropriate Committee of the Commission or the Commissioner.

(e) *Regulations.* The Commission shall, in the manner required by law and after public hearings, adopt such supplementary regulations pertaining to the issuance of coastal zone permits as it deems necessary. The Commission may thereafter, in the manner required by law, and from time to time, after public hearings, modify or adopt additional regulations or guidelines as deemed necessary to carry out the provisions of this chapter; Provided, any such rules, regulations, or guidelines issued by the Commission pursuant to this chapter may be modified, amended or revised by the Legislature in accordance with the provisions of subsection (b), section 913 of Title 3 of this Code. Such regulations shall include but are not limited to the following:

(1) procedures for the submission, review and denial or approval of coastal zone permit applications, and the form of application for coastal zone permits. The Commissioner shall devise a temporary application form which shall be used upon enactment of this chapter until such time as rules and regulations are adopted;

(2) information to be required in the application including without limitation, proof of legal interest in the property, authority to sign the application, drawings, maps, data and charts concerning land and water uses and areas in the vicinity of the proposed development and, for major coastal permits, a completed environmental assessment report as defined in section 902, subsection (o) of this chapter and appropriate supplementary data reasonably required to describe and evaluate the proposed development and to determine whether the proposed development complies with statutory criteria under which it might be approved;

(3) any person who must alter trust lands or submerged or filled lands in order to compile the data re-

quired by this section must obtain prior written authorization from the appropriate Committee of the Commission for such alteration;

(4) the payment of a reasonable filing fee for the processing by the appropriate Committee of the Commission or the Commissioner of any application for a coastal zone permit. The funds received under this paragraph shall be placed in the Natural Resources Reclamation Fund as described and provided for in section 911, subsection (f), paragraph (A) of this chapter;

(5) designation of the types of development to be conducted completely or substantially seaward of the line of mean high tide requiring a minor coastal zone permit, including but not limited to swimming or navigation buoys, moorings for vessels, small intake and outfall pipes, small private piers, small boat ramps or slips, and underwater transmission lines or cables;

(6) standards in addition to those set out in subsection (c) of this section for determining whether a development requires a minor coastal zone permit or a major coastal zone permit;

(7) requirements for the conduct and continuance of public hearings and the methods of providing public notice on major coastal zone permits. A public notice shall at a minimum state the nature and location of the proposed development, and the time and place of the public hearing, and shall be advertised in a newspaper of general circulation, and in addition be given to the applicant, any person who requests such notification in writing, any person who the Commissioner determines would be affected by or interested in such development, and the owner(s) of any/all lot(s) within or adjacent to the site of the proposed development. Joint public hearings may be held in conjunction with any such hearing required by any federal agency;

(8) contents of coastal zone permits;

- (9) notifications of denial of applications;
- (10) notices of completion and certificates of acknowledgment of compliance;
- (11) amendment, modification and revocation of coastal zone permits;
- (12) transfer or assignment of coastal permits.

(f) *The Commissioner as Zoning Administrator.* The Commissioner, pursuant to the provisions of Title 29, section 235, subsection (a), unnumbered paragraph 2 of this Code, as amended, shall perform the duties of the Zoning Administrator with respect to the administration and enforcement of the Zoning Law within the first tier of the coastal zone, and the issuance of a coastal zone permit shall constitute compliance with the requirements of the zoning law.

(g) *Coordination with other permit requirements.* Where the development or occupancy of trust lands or other submerged or filled lands, or other development in the coastal zone, requires separate and distinct approval from the United States Government or any agency, department, commission or bureau thereof, the coastal zone permit shall be contingent upon receipt of all other such permits and approvals, and no such development or occupancy shall commence prior to receipt of all such permits and approvals.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 298.

§ 911. Additional requirements for development or occupancy of trust lands or other submerged or filled lands

(a) *Permit required prior to development or occupancy.*

(1) No person shall develop or occupy the trust lands or other submerged or filled lands of the Virgin Islands without securing a coastal zone permit which includes, in addition to the elements of a section 910 permit, a

permit or lease for the development or occupancy of the trust lands or other submerged or filled lands.

(2) The provisions of this section shall be in addition to all other requirements of this chapter, and shall apply to all applications for, and issuance of, permits for development or occupancy of the trust lands or other submerged or filled lands, and for modifications or renewals of permits or leases for such development or occupancy issued prior to the effective date of this chapter.

(b) Applications and procedures.

(1) The Commission shall, in the manner required by law, adopt regulations governing the filing, content, review and processing of applications for coastal zone permits that include development or occupancy of trust lands or other submerged or filled lands; Provided, however, That all applications for coastal zone permits that include development or occupancy of trust lands or other submerged or filled lands, shall include:

(A) an environmental assessment report, as defined in section 902, subsection (o) of this chapter, of the prevailing environmental conditions of the site and adjacent properties. The report must clearly indicate probable effects, including adverse effects, to the general environment should the proposed alteration be implemented;

(B) a complete and exact written description of the proposed site, including charts, maps, photographs, topographic charts, submerged land contours, and subsurface profiles in accordance with the scope and complexity of the work and the site;

(C) a complete and exact written description of the proposed occupancy or development for which the permit is sought, defining construction methods. This description must include the details of supervisory and control procedures and credentials of the personnel responsible for this function;

(D) a written statement of alternatives, if any, to the proposed alteration.

(2) The applicant for a coastal zone permit that includes development or occupancy of trust lands or other submerged or filled lands shall have the burden of proof in demonstrating that it meets the requisite criteria established by this section.

(3) The appropriate Committee of the Commission or the Commissioner may recommend such reasonable terms and conditions to be included in any coastal zone permit that includes an occupancy or development permit or lease issued pursuant to this section as it deems necessary to ensure that such occupancy and development will be in accordance with the provisions of this chapter.

(c) *Additional findings necessary.* The appropriate Committee of the Commission or the Commissioner shall deny an application under section 910 hereof for a coastal zone permit which includes development or occupancy of trust lands or other submerged or filled lands, unless it or he makes all of the following findings:

(1) that the application is consistent with the basic goals of section 903 and with the policies and standards of section 906 of this chapter;

(2) that the grant of such permit will clearly serve the public good, will be in the public interest and will not adversely affect the public health, safety and general welfare or cause significant adverse environmental effects;

(3) that the occupancy and/or development to be authorized by such a permit will enhance the existing environment or will result in minimum damage to the existing environment;

(4) that there is no reasonably feasible alternative to the contemplated use or activity which would reduce the adverse environmental impact upon the trust lands or other submerged or filled lands;

(5) that there will be compliance with the Virgin Islands territorial air and water quality standards;

(6) that the occupancy and/or development will be adequately supervised and controlled to prevent adverse environmental effects; and

(7) that in the case of the grant of an occupancy or development lease, an occupancy or development permit for the filled land is not sufficient or appropriate to meet the needs of the applicant for such lease. The burden of proving such insufficiency or inappropriateness shall be upon the applicant.

(d) Terms of occupancy and development permits and leases.

(1) A coastal zone permit that includes an occupancy or development permit shall be issued for a definite term, shall not constitute a property right and shall be renewable only if the requirements of this section for the approval and issuance of such permits are satisfied.

(2) A coastal zone permit that includes an occupancy or development lease shall only be granted for a particular parcel of filled land and for a nonrenewable lease period of not more than 20 years.

(e) Approval by Governor and ratification by Legislature of coastal zone permits that include development or occupancy of trust lands or other submerged or filled lands. Any coastal zone permit which the appropriate Committee of the Commission or the Commissioner recommends for approval pursuant to this section, together with the recommended terms and conditions thereof, shall be forwarded by the Committee or Commissioner to the Governor for the Governor's approval or disapproval within thirty days following the Committee's or Commissioner's final action on the application for the coastal zone permit or the Board's decision on appeal to grant such a permit. The Governor's approval of any such per-

mit or lease must be ratified by the Legislature of the Virgin Islands or, in the event that the Legislature is not in session, by the Committee on Conservation, Recreation and Cultural Affairs of the Legislature. Upon approval and ratification of such permit, occupancy and any development proposed in connection therewith shall not commence until the permittee has complied with the requirements of the United States Army Corps of Engineers pursuant to Title 33 of the United States Code.

(f) Rental and reclamation fees.

(1) Coastal zone permits issued to this section shall provide for the payment by the permittee or lessee of a rental fee.

(2) Coastal zone permits issued pursuant to this section which provide for or authorize the dredging and/or removal of sand, gravel, coral or aggregate shall provide for the payment of a reclamation fee.

(3) The Commission shall, in the manner required by law for the adoption of rules and regulations and after public hearings, establish a schedule of reasonable fees for the administration of this section.

(4) Rental and reclamation fees paid pursuant to this section shall be paid to the Commissioner and covered into the Natural Resources Reclamation Fund, which fund is hereby continued by this paragraph, without hiatus, from existing law. The Commissioner of Finance is directed to maintain and provide for the administration of this fund as a separate and distinct fund in the Treasury, and to authorize disbursements therefrom, upon the certification of the Commissioner, to meet expenses incurred in the administration and enforcement of the provisions of this chapter and in the discharge of the Commission's duties thereunder. The Fund shall consist of permit and other fees and fines paid pursuant to the provisions of this chapter, and such other funds as may from time to time be appropriated thereto by the Legislature.

(g) *Modification and revocation.* In addition to any other powers of enforcement set forth in section 913 of this chapter, the Governor may modify or revoke any coastal zone permit that includes development or occupancy of trust lands or submerged or filled lands approved pursuant to this section upon a written determination that such action is in the public interest and that it is necessary to prevent significant environmental damage to coastal zone resources and to protect the public health, safety and general welfare. Such written determination shall be delivered both to the permittee and to the Legislature or its Committee on Conservation, Recreation and Cultural Affairs if the Legislature is not in session, together with a statement of the reasons therefor. It shall state the effective date of such modification or revocation, and shall provide a reasonable time in which the permittee or lessee either may correct the deficiencies stated in such written determination or may establish, to the Governor's satisfaction, that any or all of the deficiencies or reasons stated therein are incorrect. If the permittee shall fail to correct or establish the inaccuracy of such deficiencies or reasons within the time provided in such written determination the modification or revocation of such occupancy permit shall be effective as of the date stated therein; Provided, however, That the Legislature, or its Committee on Conservation, Recreation and Cultural Affairs if the Legislature is not in session, shall ratify the Governor's action within thirty days after said effective date. The failure of the Legislature, or its Committee on Conservation, Recreation and Cultural Affairs if the Legislature is not in session, either to ratify or rescind the Governor's action within said thirty-day period shall constitute a ratification of the Governor's action.

(h) *Transporting of sand or other aggregate.* Every transporter of sand, gravel, coral, aggregate, minerals or other natural products of the sea, excepting fish and wildlife, from the trust lands or other submerged or filled

lands shall display a coastal zone permit and an occupancy permit or lease as proof of authorization for such transport. The contents of such permit or lease and the manner of its display shall be prescribed by the Commissioner by regulation. To enforce this requirement, the Commissioner or his duly authorized representative shall have the right to stop any motor vehicle transporting sand, gravel, coral, aggregate, minerals or other natural products of the sea, excepting fish and wildlife, on the public roads and highways of the Virgin Islands for the purpose of ascertaining whether the material being transported has been taken from the trust lands or other submerged or filled lands and whether a coastal zone permit or occupancy permit or lease has been issued authorizing its removal pursuant to this chapter.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 303.

§ 912. Planning program

(a) *Setting of boundaries, established of titles, identification of access and amendments.* The Commission, with the assistance of the Planning Office, the Attorney General and other public agencies, shall conduct a comprehensive survey of the shorelines of the Virgin Islands to establish the landward boundaries of such shorelines in accordance with this chapter; shall conduct a comprehensive study to determine the existing status of title, ownership and control, in accordance with the provisions of this chapter, of all land within or adjoining the shorelines; and shall prepare surveys, maps and charts showing existing routes of public access to the shorelines.

(b) *Continued planning.* To ensure that the provisions of this chapter are regularly reviewed and the recommendations for revisions of, or amendments to, the Virgin Islands Coastal Zone Management Program will be reviewed and developed, and to supplement the activities of other public agencies in matters relating to the planning for and management of the coastal zone and to provide for continued territorial coastal planning and man-

agement, the Virgin Islands Planning Office shall undertake on a continuing basis such activity and research as is necessary to maintain a continued involvement in the coastal zone management process and shall be responsible, with the assistance of the Commission, for comprehensive planning in the coastal zone, for review of all amendments to the Virgin Islands Coastal Zone Management Program, and for recommending the designation of areas of particular concern.

(c) *Amendments.* Any provisions of this chapter, including the boundaries of the coastal zone and the use designations on the Land and Water Use Plan, may be amended or repealed by the Legislature of the Virgin Islands. The procedures and requirements for such amendment shall be the same as provided in Title 29, section 238 of this Code for amendments to the Zoning Law. All proposed amendments not initiated by the Commission shall be referred by the Planning Office to the Commission for comment prior to public hearing.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 308.

§ 913. Enforcement, penalties and judicial review

(a) *General.* The provisions of this section shall be cumulative and not exclusive and shall be in addition to any other remedies available at law or equity.

(b) *Enforcement.*

(1) Any person may maintain an action for declaratory and equitable relief to restrain any violation of this chapter. On a prima facie showing of a violation of this chapter, preliminary equitable relief shall be issued to restrain any further violation hereof. No bond shall be required for an action under this subsection.

(b) Any person may maintain an action to compel the performance of the duties specifically imposed upon the Commission or the Commission of any public agency by this chapter; Provided, however, That no such action

shall be brought prior to thirty days after written notice has been given to the Commission, its Committees, the Commissioner, or such public agency by the complainant specifying the duties which the complainant alleges have not been performed. No bond shall be required for an action under this subsection.

(3) The appropriate Committee of the Commission and the Commissioner shall regularly monitor a permittee's compliance with the terms and conditions of its coastal zone permit.

(4) The Commission, its Committees and the Commissioner shall have the power to enter at reasonable times upon any lands or waters in the coastal zone for which a coastal zone permit has been issued, and the permittee shall permit such entry for the purpose of inspecting and ascertaining compliance with the terms and conditions of said coastal zone permit, and to have access to such records as the Commission, its Committees or the Commissioner in the performance of its or his duties hereunder may require permittee to maintain. Such records may be examined and copies shall be submitted to the Commission or Commissioner upon request.

(5) Violation of any term or condition of any coastal zone permit issued or approved pursuant to this chapter shall be grounds for revocation or suspension thereof. Violation of any term or condition of any occupancy or development permit or lease issued prior to the effective date of this chapter shall, to the maximum extent permitted by law, be grounds for revocation or suspension thereof.

(6) When the Commission or Commissioner has reason to believe that any person has undertaken, or is threatening to undertake, any activity that may require a coastal zone permit without securing a coastal zone permit, or that may be inconsistent with any coastal zone permit previously issued, the Commission or Com-

missioner may issue a written order directing such person to cease and desist. The cease and desist order shall state the reasons for the Commission's or Commissioner's decision and may be subject to such terms and conditions as the Commission or Commissioner deems necessary to insure compliance with the provisions of this chapter including, without limiting, immediate removal of any fill or other material, suspension of the coastal zone permit, or the setting of a schedule within which steps must be taken to obtain a coastal zone permit pursuant to this chapter. Said order shall be served by certified mail or hand delivery upon the person being charged with the actual or threatend violation of this chapter, and shall be effective upon issuance; Provided, however, That such order shall grant the opportunity for a hearing.

(7) In addition to any other remedy provided herein or at law or equity, the Attorney General, the Commission or Commissioner may institute a civil action in the District Court of the Virgin Islands for an injunction or other appropriate relief, including revocation of a permit issued hereunder, or an order to prevent any person from violating the provisions of this chapter, including occupying or developing the trust lands or other submerged or filled lands, or to enforce any cease and desist order or any regulations issued hereunder.

(c) *Penalties.*

(1) Any person who violates any provision of this chapter, or any regulation or order issued hereunder, shall be subject to a civil fine of not to exceed ten thousand (\$10,000) dollars.

(2) Any violation of this chapter or any regulation or order issued hereunder shall constitute a misdemeanor. Any person convicted of such a violation shall be fined in accordance with the provisions of subsection (c), paragraph (1) hereinabove, or imprisoned not more than one year, or both.

(3) In addition to any other penalties provided by law, any person who intentionally and knowingly performs any development in violation of this chapter shall be subject to a civil fine of not less than one thousand dollars nor more than ten thousand dollars per day for each day during which such violation occurs.

(4) In addition to the foregoing and in order to deter further violations of the provisions of this chapter, the Attorney General, the Commission or Commissioner may maintain an action for exemplary damages, the amount of which is left to the discretion of the court, against any person who has intentionally and knowingly violated any provisions of this chapter.

(5) All civil penalties permitted herein shall be assessed by the appropriate court; Provided, however, That at such time, if any, that the Commission may promulgate rules and regulations establishing a procedure for the administrative assessment of civil penalties, it or the Commissioner shall have the alternative of proceeding by means of court assessment or such administrative procedure. The Commission is hereby authorized to promulgate all rules and regulations it deems necessary to implement the alternatives allowed by this paragraph.

(6) All fines collected under the provisions of this subsection (c) shall be deposited into the Natural Resources Reclamation Fund provided for in section 911, subsection (f), paragraph (4) of this chapter.

(d) *Judicial review—Writ of Review.* Pursuant to Title 5, chapter 97 and Appendix V, Rules 10 and 11 of this Code, a petition for writ or review may be filed in the District Court of the Virgin Islands in the case of any person aggrieved by the granting or denial of an application for a coastal zone permit, including a permit or lease for the development or occupancy of the trust lands or other submerged or filled lands, or the issuance of a cease and desist order, within forty-five days after

such decision or order has become final provided that such administrative remedies as are provided by this chapter have been exhausted.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 309.

§ 914. Board of Land Use Appeals

(a) *Administrative appeals or coastal zone permit applications.* Notwithstanding any provision of law to the contrary, any aggrieved person may file an appeal of an action by the Commission, its Committees, or the Commission taken pursuant to section 910 or 911 of this chapter within forty-five days thereof with the Board of Land Use Appeals, and such appeals shall be governed solely by the provisions of this section.

(b) *Procedures on appeal.* The Board shall prepare a form of application for such appeals and shall adopt in the manner required by law rules and regulations governing the submission and review of applications for appeal and the notice and procedures for conduct of public hearings on such an appeal. In addition to public notice, personal notice of such a public hearing on an appeal shall be served on the Commission or its Committees, the Commissioner, the applicant for the coastal zone permit and the aggrieved person, if they be different, any person who has requested in writing to be notified of such public hearing date, and any person who testified at the public hearing held by the appropriate Committee of the Commission to consider the original application.

(c) *Public hearings.* A public hearing on an appeal shall be held by the Board within sixty days after the appeal is filed with the Board, and a decision shall be rendered by the Board within thirty days after the conclusion of such public hearing. The Board shall notify the Commission or its Committee, the Commissioner, the applicant for the coastal zone permit and the aggrieved person, if they be different, of its decision by certified mail. Notice to all other persons who received notice of

the public hearing on appeal may be by regular mail. Such notice shall be sent within four working days of the Board's decision.

(d) *Actions of the Board.* The Board, by majority vote of its authorized members, shall either affirm or reverse the Commission's or its appropriate Committee's or the Commissioner's action and shall either approve or deny an application for a coastal zone permit. If the Board grants an application for a coastal zone permit, the Board shall impose such reasonable terms and conditions on such permit as it deems necessary to achieve the objectives and purposes of this chapter. The Board shall set forth in writing and in detail the reasons for its decision and findings of fact upon which its decision is based. If the Board reverses a Committee's or the Commissioner's action on a coastal zone permit, it must make all of the findings required by section 910, subsection (a), paragraphs (2), (3) and (4) of this chapter. A copy of the Board's action shall be available for public inspection at the Board's offices during ordinary business hours. The Board's action shall be final after four working days allowing its decision.—Added Oct. 31, 1978, No. 4248, § 1, Sess. L. 1978, p. 312.

TITLE 48 U.S.C. CODE ANNOTATED

§ 1471. Local or special laws

The legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

Granting divorces.

Changing the names of persons or places.

Laying out, opening, altering, and working roads or highways.

Vacating roads, town plats, streets, alleys, and public grounds.

Locating or changing county seats.

Regulating county and township affairs.

Regulating the practice in courts of justice.

Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables.

Providing for changes of venue in civil and criminal cases.

Incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village.

For the punishment of crimes or misdemeanors.

For the assessment and collection of taxes for Territorial, county, township, or road purposes.

Summoning and impaneling grand or petit jurors.

Providing for the management of common schools.

Regulating the rate of interest on money.

The opening and conducting of any election or designating the place of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Chartering or licensing ferries or toll bridges.

Remitting fines, penalties, or forfeitures.

Creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof. July 30, 1886, c. 818, § 1, 24 Stat. 170.

§ 1471. Repealed. Pub. L. 98-213, § 16(w), Dec. 8, 1983, 97 Stat. 1463

TITLE 1 VIRGIN ISLANDS CODE

§ 4. Application of common law; restatements

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

RESTATEMENT OF PROPERTY

§ 370. Rule against Perpetuities—Limitation of a Future Interest in Favor of One Other than the Conveyer.

Subject to exceptions stated in §§ 373 (destructible interest), 395 (option in a lessee), 397 (charity), and 400 (unissued shares of a corporation), the limitation of a future interest in favor of one other than the conveyer is invalid when, under the language and circumstances of such limitation, such future interest may continue to be subject to an unfulfilled condition precedent for longer than the maximum period described in § 374.

§ 374. Permissible Period under Rule against Perpetuities.

The maximum period allowed under the rule against perpetuities is

(a) lives of persons who are

(i) in being at the commencement of such period, and

(ii) neither so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain; and

(b) twenty-one years; and

(c) any period or periods of gestation involved in the situation to which the limitation applies.

§ 393. Option Limited in Favor of One Other than the Conveyer.

Subject to exceptions stated in §§ 373 (destructible interest), 395 (option in a lessee), 397 (charity) and 400 (unissued shares of a corporation), the limitation of an option in favor of a person other than the conveyer is invalid because of the rule against perpetuities when,

under the language and circumstances of the limitation, such opiton

- (a) may continue for a period longer than the maximum period described in § 374; and
- (b) would create an interest in land, or in some unique thing other than land, but for the rule against perpetuities

§ 402. Partial Invalidity—Effect on Balance of Attempted Disposition.

When part of an attempted disposition fails as a direct consequence of the rule against perpetuities, the effect, if any, of this partial invalidity upon the balance of the attempted disposition is determined by judicially ascertaining whether the conveyor, if he had known of this partial invalidity, would have preferred that

- (a) all the balance of the attempted disposition take effect, in accordance with its terms; or that
- (b) certain parts of the balance of the attempted disposition fail, but the rest thereof take effect in accordance with its terms; or that
- (c) all the balance of the attempted disposition fail.

RESTATEMENT (SECOND) OF FOREIGN
RELATIONS LAW OF UNITED STATES

TOPIC 1. INTERNATIONAL LAW

§ 155. Special Provisions in Agreement

An international agreement may be modified, suspended, or terminated in accordance with provisions included for that purpose in the agreement.

§ 156. Consent of Parties

An international agreement may be modified, suspended, or terminated by the consent of the parties,

except that when an international agreement confers a right, as indicated in § 139, upon a state not a party to the agreement, the consent of that state is required for the modification, suspension, or termination of the right, if either

(a) the agreement provides for acceptance of the right and it has been accepted, or

(b) there is no such provision but the state has changed its position in reliance upon the continuing existence of the right and its modification, suspension, or termination would be a substantial detriment to the state.

c. *Consent of all parties essential.* The consent must be the consent of all parties if the agreement is to be validly modified, suspended, or terminated with respect to all parties. If not unanimous, the modification, suspension, or termination of the agreement is effective as between the parties so consenting but may constitute a violation of the rights of the other parties under the agreement.

TOPIC 2. LAW OF THE UNITED STATES

§ 163. Authority to Modify, Suspend, or Terminate

(1) Under the law of the United States, the President or a person acting under his authority, has, with respect to an international agreement to which the United States is a party, the authority to

(a) take the action necessary to accomplish under the rule stated in § 155 the suspension or termination of the agreement in accordance with provisions included in it for the purpose,

(b) make the determination of conditions that establish that the agreement may be suspended or terminated under the rule stated in § 158 because of its violation by another party or that it is terminated

under the rule stated in § 159 as regards a party that has ceased to exist,

(c) elect in a particular case not to suspend or terminate the agreement when the United States may do so under the rule stated in § 158 because of violation of the agreement, or not to pursue a claim that the United States has under the rule stated in § 3(1)(a) for the violation of international law resulting from violation of the agreement.

(2) The modification, suspension, or termination of an international agreement to which the United States is a party, by the consent of the parties under the rule stated in § 156, is subject to the same rules as apply to the making of an international agreement as stated in §§ 117-121.

JUL 29 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,

—and—

Appellants,

LEGISLATURE OF THE VIRGIN ISLANDS,

Appellant,

—v.—

THE WEST INDIAN COMPANY, LIMITED,

Appellee,

—v.—

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

**MOTION OF APPELLEE THE WEST INDIAN
COMPANY, LIMITED TO DISMISS OR AFFIRM**

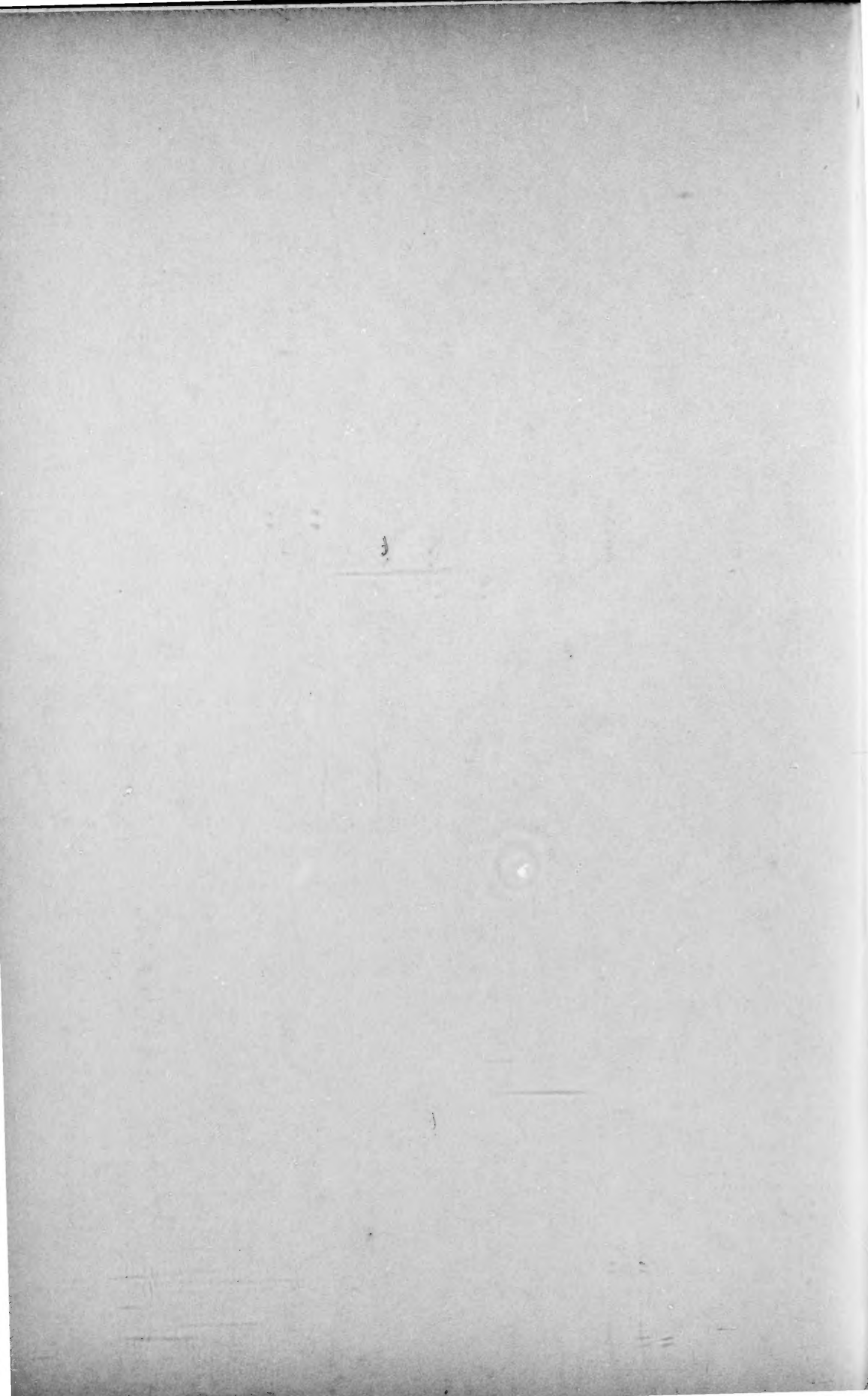
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July 29, 1988

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QUESTIONS PRESENTED

- I. Does an appeal as of right lie under 28 U.S.C. § 1254(2) from a decision of the United States Court of Appeals holding a statute enacted by a territorial legislature unconstitutional?
- II. Where the Government of the Virgin Islands, acting for a valid public purpose, has settled a longstanding dispute with respect to rights to submerged lands, and the settlement agreement has been ratified by the Legislature of the Virgin Islands after due deliberation, does a subsequent Legislature's unilateral repeal of the settlement agreement for reasons unrelated to a proper exercise of police power violate the Contract Clause of the Constitution?
- III. Have the Citizen-Intervenors and the Legislature of the Virgin Islands raised substantial federal questions, warranting plenary briefing and argument on the merits, concerning the validity of a 1982 settlement agreement between the Government of the Virgin Islands and a private entity?

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S. Rep. No. 735, 87th Cong., 1st Ses., <i>reprinted in</i> 1961 U.S. Cong. & Admin. News. 2248	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,

Appellants,

—and—

LEGISLATURE OF THE VIRGIN ISLANDS,

—v.—

Appellant,

THE WEST INDIAN COMPANY, LIMITED,

—v.—

Appellee,

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

**MOTION OF APPELLEE THE WEST INDIAN
COMPANY, LIMITED TO DISMISS OR AFFIRM**

Pursuant to Rule 16.1, appellee The West Indian Company, Limited ("WICO")¹ moves to dismiss the appeals of the Legislature of the Virgin Islands ("Legislature") and the Citizen Intervenors Helen Gjessing, individually and as President of Save Long Bay Coalition, Inc., Leonard Reed, individually and as President of Virgin Islands Conservation Society, Inc., Kate Stull, individually and as President of League of Women Voters of V.I., Inc., Lucien Moolenaar, individually and as President of Virgin Islands 2000, Inc., and Ruth Moolenaar, individually and as Director of St. Thomas Historical Trust, Inc. ("Citizen Intervenors"). The motion to dismiss is based on the fact that these appeals are not within this Court's jurisdiction under 28 U.S.C.A. § 1254(2), the jurisdictional statute relied upon by appellants.

In the alternative, pursuant to Rule 16.1(c), WICO moves to affirm the judgment of the United States Court of Appeals for the Third Circuit, entered March 31, 1988 and reported at 844 F.2d 1007 (3rd Cir. 1988), on the ground that the decision below is manifestly correct and does not present a substantial federal question which warrants further briefing and argument.

1 Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, parent companies of the The West Indian Company, Limited include The East Asiatic Company Ltd. A/S (Denmark), EAC USA Inc. (Delaware), and EAC Nevada Inc. (Nevada). Affiliates of The West Indian Company, Limited include the following: Baumfolder Corporation (Ohio), Baumfolder Delaware Inc. (Delaware), Heidelberg Eastern, Inc. (Delaware), EAC Graphics USA Inc. (Massachusetts), DAK Foods, Inc. (Delaware), The East Asiatic Company (Canada) Inc. (Delaware), Plumrose Canada Inc. (Canada, Federal Charter), The East Asiatic Company de Mexico, S.A. (Mexico), The East Asiatic Company's Holding Co. (Cayman Islands) Ltd., The East Asiatic Company (Cayman Islands) Ltd., and EAC Delaware Inc. (Delaware).

STATEMENT OF FACTS

This case arises out of the repudiation by the Sixteenth Legislature of the Virgin Islands of a settlement agreement between WICO and the Government of the Virgin Islands, which had been ratified by two prior Legislatures. The repudiation took the form of legislation² repealing two prior legislative enactments recommending and ratifying the settlement of a long-standing dispute which clouded title to a portion of St. Thomas Harbor. The Repeal Act was promptly vetoed by the Governor on the ground that it was a "sad betrayal of the public trust" (WICO App. 1a).³ Thereafter, the Sixteenth Legislature overrode the Governor's veto and passed the Repeal Act into law (Joint App. 175a).

The settlement agreement at issue consists of a formal written agreement entitled Memorandum of Understanding, dated as of the 3rd day of October, 1973, among the United States Department of the Interior, the Government of the Virgin Islands, WICO, and others (hereinafter "1973 Memorandum") (Joint App. 117a), as amended by further written agreements dated October 28, 1975 (hereinafter "First Addendum") (Joint App. 145a), and September 23rd, 1981 (hereinafter "Second Addendum") (Joint App. 151a).

The Second Addendum was the final resolution of an ongoing dispute relating to rights granted to WICO by the Danish Government to reclaim and fill in a portion of St. Thomas Harbor. Those rights were specifically guaranteed in the 1917 Treaty of Cession (hereinafter "Treaty") between the United States and Denmark relating to the Virgin Islands (Joint App. 98a). The Treaty, Article 3, provides:

2 Act No. 5158, Sixteenth Legislature of the Virgin Islands (Bill No. 16-0607), hereinafter the "Repeal Act" (Joint App. 175a).

3 Pursuant to Rule 16.3, WICO, as appellee, respectfully submits an appendix in conjunction with its present motion. In order to avoid duplication, WICO includes in its appendix ("WICO App.") only pertinent documents omitted from the Joint Appendix to Jurisdictional Statements ("Joint App.") filed by appellants.

- 4) The United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:
 - a. The concession granted to 'Det vestindiske Kompagni' (the West-Indian Company) Ltd. by the communications from the Ministry of Finance of January 18th, 1913 and of April 16th, 1913 relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor.

(Joint App. 101a).

The January 18th, 1913 letter from the Danish Finance Ministry referred to in the Treaty granted WICO the right to reclaim and fill a substantial area at Long Bay in St. Thomas Harbor (Joint App. 113a). WICO built its existing dock in a portion of that area in 1914, leaving approximately 42 acres for future reclamation.

In 1968, the United States commenced an action against WICO and others to quiet title to certain reclaimed lands within the area of WICO's Danish grant and to obtain an adjudication that WICO's rights to reclaim had lapsed. *United States v. West Indian Company Ltd., et al.*, District Court of the Virgin Islands, Civil No. 337-1968 (hereinafter the "1968 lawsuit") (Joint App. 85a *et seq.*). WICO defended on the grounds that (a) the grant of the right to reclaim was vested and in perpetuity, and (b) in any case, the unexercised rights could not be terminated without first giving WICO notice and the opportunity to complete. WICO's position was supported by a formal diplomatic note from the Danish Government dated June 25th, 1970, which stated that WICO's treaty rights originally had been granted by the sovereign Denmark without condition as to time and requested that those rights be respected (WICO App. 4a-5a).

While the 1968 lawsuit was pending, WICO made a settlement proposal to the United States Department of the Interior and to the Virgin Islands Government, the latter of which was not formally a party to the litigation. Essentially, this proposal involved WICO relinquishing its claim to approximately 12 acres and retaining its claim to 30 acres, in exchange for which the United States and Virgin Islands Governments would recognize WICO's right to reclaim and ultimately obtain fee simple title. In addition, the Virgin Islands Government would reserve the right to acquire these lands or rights of WICO by eminent domain or condemnation, but not otherwise.⁴ Judge Warren Young, the presiding judge, made a formal written recommendation in favor of the settlement to the Virgin Islands Government on the grounds that WICO was likely to prevail in the lawsuit and that the settlement proposal appeared to meet all local government objectives (Joint App. 90a).⁵

The Ninth Legislature of the Virgin Islands, after conducting public hearings, approved Act No. 3326, recommending the settlement on October 30, 1972 (Joint App. 178a). Thereafter the Government of the Virgin Islands, the United States Government and other private parties with interests in the harbor executed the 1973 Memorandum. The 1973 Memorandum was filed with the Court, which stayed the action pending completion of the conditions set out in the agreement, subject to quarterly status reports to the Court (WICO App. 6a-7a).

The 1973 Memorandum adopted a two-step procedure for transferring title to the 30 acres to WICO after reclamation in

4 Other important conditions of the proposal are described in the decision below, at 844 F.2d at 1010 (Joint App. 11a-12a).

5 WICO objects to Citizen Intervenors' characterization of Judge Young's effort to settle the 1968 lawsuit as "certain coercive acts." Judge Young encouraged the Governor of the Virgin Islands, Melvin Evans, to recommend the Memorandum of Understanding to the Secretary of the Interior, since the principal beneficiary of the Memorandum was the Government of the Virgin Islands. Judge Young's letter was sent to members of the Virgin Islands Legislature, and all interested counsel, and constituted nothing more "coercive" than a District Court Judge characterizing a proposed settlement, in light of all the circumstances, as desirable.

order to comply with the 1963 Territorial Submerged Lands Act⁶ then in force (Joint App. 188a). The United States, which held title to the submerged lands surrounding the Virgin Islands, would convey to the Virgin Islands Government, which in turn would convey to WICO.

Shortly after the 1973 Memorandum was executed, the 1974 Territorial Submerged Lands Act⁷ transferred title of submerged lands in the Virgin Islands from the Federal Government to the Government of the Virgin Islands, "subject to all valid existing rights" (hereinafter "1974 Act") (Joint App. 192a). Because the need for a two-step transfer procedure was eliminated by the 1974 Act, the First Addendum to the 1973 Memorandum was executed (Joint App. 145a). In substance, the First Addendum substituted the Virgin Islands Government for the Government of the United States in all respects.

In 1977, while WICO was engaged in the environmental impact process with the U.S. Army Corps of Engineers, the Virgin Islands Government passed into law the Coastal Zone Management Act ("CZMA") (Joint App. 207a).⁸ WICO advised the Virgin Islands Government that application of the CZMA to its interests would constitute a material breach of the 1973 Memorandum in the following respects: the CZMA forbade conveyance of title to submerged lands; the CZMA imposed rental charges and charges for dredge fill; the CZMA imposed substantial zoning restrictions; and the CZMA made reclaiming and uses a discretionary matter (Joint App. 198a-204a). WICO also made it clear that it would file suit to vindicate its position that the CZMA could not be applied to its rights as recognized in the settlement agreement.

In response to WICO's contention that full application of the CZMA would constitute a material breach of the 1973 Memorandum, as amended, the Virgin Islands Government retained as special counsel Professor Ira Michael Heyman, a leading

6 Pub. L. No. 88-183, 77 Stat. 338.

7 Pub. L. No. 93-435, 88 Stat. 1210 (amended 1980).

8 V.I. Code Ann., Tit. 12, 901-14 (1977).

professor of land law at the University of California at Berkeley, who had been the draftsman of the CZMA, and a colleague, Donald Gralnik of a Los Angeles law firm, together with an Assistant Attorney General of the Virgin Islands. Extended negotiations on the CZMA issue resulted in the Second Addendum (Joint App. 151a). WICO's reclaiming area was further reduced in the Second Addendum from 30 acres to approximately 15 acres, of which the Virgin Islands Government would obtain one acre, with WICO agreeing to provide retaining structures for the Government. The Third Circuit Court of Appeals accurately summarized the other essential terms of the Second Addendum as follows:

There are many additional conditions in the Second Addendum. WICO agreed, for example, to specified zoning restrictions and specified limited uses, to a height restriction of three stories, and to reserve a certain percentage of its area for "usable open space." § 11(b). These agreed-upon restrictions, however, apply only to development commenced within ten years of reclamation and completed within 15 years of reclamation; any development not commenced or completed within these time limits, and "any development beyond that explicitly contemplated by this Agreement," is controlled instead by the "then current laws," the CZMA or its future equivalent. § 12(a). In addition, the Second Addendum provides that "as to any matters not specifically covered by the Agreement, such as utilities, siting, performance standards, design and landscape, WICO shall be subject to the requirement of a Coastal Zone Management permit." § 12(b). The Virgin Islands Government, for its part, agreed in the Second Addendum that WICO was not to be subject to the charges mandated by § 911 for rental of or removal of dredge fill from publicly-held lands, and that WICO was to be able to use its land free of the use or rental charges imposed by § 911 on publicly-held land. § 19(e).

* * *

The Second Addendum follows the Memorandum in stating that when the specified acreage has been reclaimed,

“WICO shall have title to and ownership of the areas filled . . . provided that WICO is then in compliance with Section 2 of this Agreement requiring WICO to fill and provide land for the V.I. Government,” and that “[e]xcept as otherwise specifically provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties, their successors and assigns.” § 16(b). The Second Addendum also specifies that nothing contained in it is to affect the rights of the United States or Virgin Islands Governments to acquire by eminent domain or condemnation the lands covered by the Addendum. § 19(a).

(Joint App. 17a-18a).

Because the Second Addendum contemplated specific revisions in the CZMA, and indeed could not be implemented without such revisions, the Second Addendum was conditioned on the enactment of appropriate enabling legislation. The Second Addendum was recommended by the Government’s special counsel as favorable to the Government (WICO App. 8a-10a), and was thereafter executed by Governor Luis. The enabling legislation which ratified the Second Addendum was enacted by the Fourteenth Legislature as Act No. 4700 (Joint App. 176a).

The Second Addendum thus was a carefully negotiated document which settled prospective litigation between WICO and the Virgin Islands Government over the question of whether the CZMA could be applied in its entirety to WICO’s rights as previously defined in the Memorandum of Understanding. The Second Addendum accommodates the environmental and zoning objectives of the CZMA and WICO’s recognized rights to reclaim, develop, and own the filled land, which existed prior to the CZMA’s enactment. WICO agreed to provide structural improvements agreeable to the Federal Government “or the judgment of the V.I. Government” (Joint App. 152a), agreed to specified time limits for commencing filling (Joint App. 152a-153a), agreed to provide underwater surveys for the approval of the Virgin Islands Government (Joint App. 157a),

agreed to place its dredging under the monitoring of the Virgin Islands Department of Conservation and Cultural Affairs (Joint App. 159a), and agreed to certain specified uses for the filled land (Joint App. 165a),⁹ height restrictions (Joint App. 165a), and usable open spaces (Joint App. 166a). The Second Addendum was, in addition, a substantial limitation of WICO's rights under the Memorandum of Understanding in terms of the acreage to be reclaimed (*i.e.*, 15 acres reduced from 30 acres).

On April 16, 1984, the District Court entered an order *sua sponte* dismissing the 1968 lawsuit under Fed.R.Civ.P. 41(b) for failure to prosecute. No appeal was taken and no motion to reopen was made under Fed.R.Civ.P. 60(b).¹⁰

In reliance on the Second Addendum, WICO embarked on a lengthy and expensive process preparatory to dredging and reclaiming. After public hearings, a Virgin Islands Coastal Zone Permit (WICO App. 11a-18a) (issued in part on the basis of opinions from legal counsel to the Governor and the Legislature, and from the Attorney General (WICO App. 20a-27a)) and a U.S. Army Corps of Engineers permit were issued (WICO App. 28a-35a).¹¹ WICO spent over \$400,000 for legal, engineering and environmental services during the permitting and bid processes, after execution of the Second Addendum (WICO App. 36a).

9 Citizen Intervenors' reference to WICO's "undisclosed development purposes" (Citizen Intervenors' Jurisdictional Statement, pp. 10-12) is highly misleading; the Second Addendum plainly listed specific permissible uses for the reclaimed land (Joint App. 165a).

10 The Citizen Intervenors unsuccessfully sought to reopen the 1968 lawsuit in connection with this proceeding.

11 Citizen Intervenors' characterization of WICO's permits as having been obtained "without following standard statutory procedures" (Citizen Intervenors' Jurisdictional Statement, pp. 6-7) is baseless. The inference that WICO obtained its permits in anything less than proper fashion is wholly unsupported by the record as reflected by appellants' failure to cite any part of the Joint Appendix to substantiate this charge.

In June 1986 site preparation and dredging began. After this process began, without prior warning, the Virgin Islands Legislature called itself into special session and passed the Repeal Act on July 9, 1986. There was no report; contrary to the Legislature's present position before this Court, the Legislature's debate on the Repeal Act is devoid of any discussion of environmental or ecological concerns.¹² In fact, the principal, if not exclusive, issue was the repudiation of WICO's right to title to the submerged lands.¹³

- 12 At only one point in the debate does any Senator express any arguable environmental concern, and even then it is a concern about tourism, not the environment:

And I say to you, that I have learned from sources that part of their intention is to bunker fuel on that site. If we have not learned from our experience with the oil spill that we had recently if we had not learned that, that could mean the total destruction of the tourism (sic) industry for another oil spill to occur here in this harbor.

Senator Magras, Transcript, Sixteenth Legislature of the Virgin Islands, July 9, 1986. Legislature Debate (hereinafter "Legislature Debate"), Part I p. 67 (WICO App. 43a).

- 13 Contrary to the Legislature's present contention that the intent of the Repeal Act was "to avoid infringing whatever title WICO may have had in that land" (Legislature's Jurisdictional Statement, p. 11), the legislative record shows that the Senators challenged the very existence of WICO's rights as a "vestige of colonialism":

Senator O'Bryan, Jr.: "... [M]y concern relative [sic] to West Indian Company claim goes back to the basic treaty. I basically, categorically reject the right of any foreign entity to maintain control over the submerged land of this territory for seventy-three years."

"... I do not subscribe to the issue of an agreement being an agreement. The agreement we talk about is an agreement that is vested with colonialism and its root cause." Legislature Debate, Part I pp. 62-63 (WICO App. 41a).

Senator Berry: "... [W]hen I vote today to repeal that contract it's based on the fact that I don't want any colonial power trying to control any land in these islands." Legislature Debate Part I p. 74 (WICO App. 45a).

In short, the debates make it clear that the purpose of the Repeal Act was to strip WICO of its rights to hold title:

Senator Bryan: "We have to get clear on that; submerge (sic) land is trust territory; nobody, this government, this legislature, the

Shortly after passage, the Governor vetoed the Repeal Act, stating:

This bill would dishonor Virgin Islands Government commitments to The West Indian Company Ltd. (WICO) that have been entered into, after long and careful deliberation, on several previous occasions.

. . . Notwithstanding the apparent perception of the nine members of the Legislature who voted to repeal the WICO agreements that they were responding to substantial public opinion on the dredging issue, their action is in reality a sad betrayal of the public trust.

judge cannot give away trust land." Legislature Debate Part I, p. 45 (WICO App. p. 38a).

" . . . The legislature was—the First, the Sixth or the Thirteenth, or the Seventeenth or Twentieth, has no legal authority to sell or transfer trust land." Legislature Debate Part I p. 46. (WICO App. 38a).

" . . . [t]hese land (sic) belong to the people of the Virgin Islands. We are going to take it back, even if we have to go— I am not accepting their excuse there's a contract. There's no contract. I want the land back; it's ours." Legislature Debate Part I p. 47 (WICO App. 39a).

Senator Brown: "What we are talking about are rights, title and ownership. It is this government that should have the right and title, and if we want to let West Indian Company dredge and fill, we let them do it at our discretion, on our land." Legislature Debate Part I p. 61 (WICO App. 40a).

Senator Magras: "There is no country, Denmark, the United States nor the Virgin Islands that allow any individual or corporation to own submerged land." Legislature Debate Part I p. 65 (WICO App. 42a).

Senator Berry: ". . . [T]his body didn't have the authority to give title of submerged lands to a private entity, and since you didn't have that authority, the contract is invalid." Legislature Debate Part I, pp. 73-74 (WICO App. 45a).

Senator Bryan: "The repeal of those acts, in fact, would stop West Indian Company and those involved believing that that land was West Indian Company land. It is not West Indian Company land." Legislature Debate, Part II, p. 43 (WICO App. 46a).

In the instant case, the better judgment of two-thirds of the members of the Legislature has been sacrificed to the opinions of a few vocal and misguided individuals who have successfully capitalized on the re-election fears of these "community followers".

(WICO App. 1a-3a).

On August 11, 1986, the Legislature in special session voted to override the veto. The Repeal Act thus became law, and WICO immediately sought a temporary restraining order and preliminary injunction against interference with its rights in the District Court of the Virgin Islands. Significantly, the Attorney General of the Virgin Islands declined to represent the Government in this case on the grounds that to seek to uphold the Repeal Act would violate his obligations under Rule 11 of the Federal Rules of Civil Procedure, and might constitute a breach of the Canon of Ethics (Joint App. 21a).

On August 26, 1986, the District Court of the Virgin Islands heard WICO's request for a preliminary injunction. District Judge O'Brien correctly noted that prior to the 1986 Repeal Act:

three successive elected governors, their respective attorneys general, and two separate Legislatures of the Virgin Islands have recognized WICO's right to dredge and reclaim certain defined submerged lands in the harbor of Charlotte Amalie. The various officials described above successfully negotiated limits with respect to both acreage and time as to WICO's rights, and gained important concessions in favor of the territory. The reason for this case is that the Sixteenth Legislature, now sitting, takes issue with the validity of the actions undertaken by the territorial officials above described.

[Joint App. 59a-60a].

WICO's motion for a preliminary injunction was granted (643 F. Supp. 869) (Joint App. 53a); an appeal was filed and the District Court's decision was affirmed *per curiam* by the United

States Court of Appeals for the Third Circuit (812 F.2d 134) (Joint App. 50a). Subsequently, the District Court granted summary judgment for WICO on the merits and permanent injunctive relief from interference with WICO's rights under the Memorandum of Understanding and the Second Addendum (658 F. Supp. 619) (Joint App. 41a).

The District Court's order granting a permanent injunction on behalf of WICO was appealed to the United States Court of Appeals for the Third Circuit by the Citizen Intervenors and the Legislature. The Court of Appeals affirmed the decision of the District Court without dissent on March 31, 1988 (844 F.2d 1007) (Joint App. 6a). Notice of appeal by Citizen Intervenors was filed with this Court on April 21, 1988 and notice of appeal was filed by the Legislature on June 13, 1988.

These appeals essentially raise the same issues considered at length by the District Court and the Court of Appeals in connection with the temporary restraining order and preliminary injunction, the interlocutory appeal from the preliminary injunction, the grant of summary judgment and a permanent injunction in favor of WICO, and the appeal of summary judgment and permanent injunctive relief to the Third Circuit Court of Appeals.

ARGUMENT

I. The Appeals Must Be Dismissed Because The Repeal Act Is Not A "State Statute" For Purposes of 28 U.S.C. § 1254(2).

All appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1254(2), which states that "[c]ases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: . . . (2) by appeal by a party relying on a State statute held by a Court of Appeals to be invalid as repugnant to the Constitution, . . . and the review on appeal shall be restricted to the federal questions presented."

The Jurisdictional Statement of the Legislature states that the Supreme Court "has apparently not yet determined whether the invalidation of a territorial statute confers appellate jurisdiction

under 28 U.S.C.A. § 1254(2).'' (Legislature's Jurisdictional Statement, p. 3). That is incorrect. In *Fornaris v. Ridge Tool Company*, 400 U.S. 41, 42 n.1 (1970), the Court ruled that ''a Puerto Rican statute is not a 'state statute' within 1254(2).''

The plain language of § 1254(2) clearly does not encompass constitutional rulings with respect to territorial statutes. Consistent with the practice of strictly construing statutes which authorize appeals, this Court has stated that an expansive interpretation of the word ''state'' is precluded. *Id.*; see also *California Coastal Commission v. Granite Rock*, ____ U.S. ____, 107 S.Ct. 1419, 55 U.S.L.W. 4366, 4368 (1987) (''statutes authorizing appeals are to be strictly construed''); *Palmore v. United States*, 411 U.S. 389, 396 (1973) (''A reference to 'state statutes' would ordinarily not include provisions of the District of Columbia Code . . . Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' ''); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1983), *reh'g denied*, 465 U.S. 1074 (1984).

In holding that a Puerto Rican statute is not a State statute within § 1254(2), this Court in *Fornaris* distinguished 28 U.S.C. § 1258. The *Fornaris* Court found it significant that Section 1258 has an express provision for appeals to the Supreme Court of constitutional rulings with respect to Puerto Rican statutes and that Section 1254(2) had no such parallel provision.

The Citizen Intervenors attempt to distinguish *Fornaris* by pointing out that Section 1258 provides this Court with jurisdiction over appeals of final judgments or decrees rendered by the Supreme Court of Puerto Rico, but that no statute specifically provides for appellate jurisdiction over decisions invalidating territorial legislation. Thus, the Citizen Intervenors argue that if Section 1254(2) is strictly construed, they ''will be denied equal access to the Supreme Court of the United States and will be precluded from exercising their due process right to seek review as a matter of right by the Supreme Court of the United States'' (Citizen Intervenors' Jurisdictional Statement at pp. 2-3, n.1).

Apart from the attempt to create novel rights to Supreme Court appellate review, the argument of the Citizen Intervenors is wide of the mark as a factual matter. Section 1258 only permits Supreme Court review by appeal where a Puerto Rican Statute has been upheld as being *constitutional*, but where the statute has been held *unconstitutional*, review by the Court must be by writ of certiorari. In this case, the Third Circuit affirmed the District Court's holding that the Repeal Act is unconstitutional.

Moreover, a review of the legislative history of Section 1258 reveals a dual purpose for its enactment and undermines Appellants' jurisdictional argument. First, Congress intended to increase judicial efficiency. Prior to the enactment of Section 1258, the Court of Appeals for the First Circuit reviewed final judgments and decrees of the Supreme Court of Puerto Rico. The First Circuit's decisions were then subject to review by the Supreme Court of the United States pursuant to the usual provisions for review of decisions of the courts of appeals. Section 1258 eliminated the First Circuit from the review process in an effort to promote judicial economy.¹⁴

Second, Congress intended to acknowledge the change in status of Puerto Rico "*from that of a territory to that of an associated Commonwealth . . .*" *Id.* (emphasis added). Thus, Puerto Rico, as a Commonwealth, enjoys a different status from that of the Virgin Islands, which is an "unincorporated territory." See *Water Isle Hotel v. Kon-Tiki, Inc.*, 795 F.2d 325, 327 (3d Cir. 1986) ("By statute the Virgin Islands is specifically designated as an unincorporated territory which does not enjoy the autonomy of a state within the union"); see also *U.S. v. Santiago*, 576 F.2d 562, 563 (3d Cir. 1978) ("Congress is not obliged to extend provisions of every federal statute to the territories").

This Court should not depart from the well-established practice of strictly construing jurisdictional statutes. Accordingly, WICO respectfully moves this Court to dismiss the appeals of

14 S.R. 735, 87th Cong., 1st Sess., reprinted in 1961 U.S. Cong. & Admin. News, 2248, 2248-49.

Citizen Intervenors and the Legislature on the ground that this Court has no jurisdiction under 28 U.S.C. § 1254(2).

II. The Court of Appeals' Decision That The Legislature's Repudiation of the Settlement Agreement Through the Repeal Act Violated the Contract Clause of the Constitution Is Manifestly Correct and Does Not Warrant Further Review.

The issue of whether the Repeal Act violated the Contract Clause of the United States Constitution has been addressed by the District Court of the Virgin Islands in two separate decisions, and by the United States Court of Appeals for the Third Circuit twice, five different judges sitting. In its most recent pronouncement, the Third Circuit properly found that the Second Addendum and its enabling legislation constituted "unambiguous evidence . . . of legislative intent to create enforceable private rights in WICO and that the Second Addendum was intended by all concerned to be a binding contract between WICO and the Virgin Islands Government." 844 F.2d 1007, 1017 (Joint App. 27a-28a).

The Citizen Intervenors argue that police power cannot be limited by contract. This argument flies in the face of Supreme Court precedent:

If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978), *reh'g denied* 439 U.S. 886 (1978).

The Supreme Court enunciated a three-part test in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) for cases in which Contract Clause claims must be balanced against legislation passed in exercise of the state's police power. As the Third Circuit correctly noted, that three-part test was not satisfied by the Repeal Act. 844 F.2d at 1022

(Joint App. 37a-39a). The Court noted that the first prong of the test was satisfied, *i.e.*, the law operated as a substantial impairment of a contractual relationship; but held that the Repeal Act did not meet the second prong of that test, namely, it was not justified by significant and legitimate public purpose. The Repeal Act was aimed solely at WICO and no pressing public purpose was identified either in the Act itself or in the Legislature's debate prior to passage. The Legislature's present position that the Repeal Act constituted proper exercise of the Government's police power to regulate an environmentally sensitive area, and was not intended to contest WICO's rights to the lands, is a futile attempt to rewrite history.¹⁵

The Second Addendum directly addresses both title and quality of title conveyable. The Repeal Act by its terms, repudiates the Second Addendum *in its entirety*. The Repeal Act places squarely in question the quality of title, if any, which WICO might ever hold. Only the most tortuous reading of the Repeal Act, coupled with ignorance of the legislative debate which accompanied passage of the Act, can support the conclusion that the Act was aimed at protection of the environment as opposed to stripping WICO of its right to reclaim and its prospective title to the lands in question. The effect of the Repeal Act is to abrogate the basic obligations of the Government under the Second Addendum. It was not, as the Jurisdictional Statement of the Legislature asserts, simply an effort to require WICO to obtain certain development permits under the CZMA; as the debates indicated, it was an effort to strip WICO of *all* rights given it under the Second Addendum and, by sub-

15 The Legislature's attempt to equate the purpose of the Repeal Act with the environmental and zoning purposes of the CZMA is transparent and unsupported by the record. While ecology may have been one of the objects of the CZMA, the Repeal Act identifies no purpose in its legislative history except to strip WICO of its rights to reclaim and own those reclaimed lands. Further, the Repeal Act completely abrogated the Second Addendum, reducing WICO from prospective fee simple owner to prospective CZMA permit applicant.

stituting the CZMA in its place, reduce WICO to the status of a prospective applicant for CZMA permit.¹⁶

The Second Addendum requires the Government to convey title to the reclaimed areas (Joint App. 161a-162a). By reinstating the amended sections of the CZMA, the Government precluded itself from conveying title. CZMA Sections 911(a)(1) and (d) provide that trustlands or submerged lands of the Virgin Islands may not be developed or occupied without a permit or lease for development, and that an "occupancy or development lease shall only be granted . . . for a nonrenewable lease period of not more than 20 years." Under the Second Addendum, the Government is required to convey title without further payment by WICO, and is expressly precluded from imposing rental fees or charges (19(e)) (Joint App. 172a). CZMA Section 911(f)(1) requires the payment of a rental fee. The right guaranteed by the Second Addendum to build marinas without fee would be abrogated; marina construction requires both permits and rental fees.¹⁷ The Second Addendum includes an express undertaking by the Government not to impose any charge for dredging (19(e); Joint App. 172a). CZMA Section 911(f)(2) requires the payment of a reclamation fee for dredging. The guarantee that WICO may engage in specific uses in the Second Addendum would be totally abrogated by the Repeal Act (11(b); Joint App. 165a).

Additionally, the CZMA requires that all submerged land permits be ratified by the Governor and the Legislature

16 The Legislature's argument that the Repeal Act did not affect WICO's title because WICO could apply for a "fully renewable permit" of indefinite duration is disingenuous (Legislature's Jurisdictional Statement, pp. 9-11). The Second Addendum promised WICO fee simple ownership; the Repeal Act abrogated the Second Addendum completely. The Legislature's argument that fee simple ownership may be equated with a renewable permit of unspecified duration, which is then subject to approval of the Legislature and Governor of the Virgin Islands, is ironic in the circumstances of this case. After all, this is the same Legislature that made a solemn commitment to WICO in the Second Addendum and then turned its back on that commitment in response to political pressure.

17 See CZMA § 911(f)(1) and regulations (Joint App. 239a).

(911(e)), with the result that the issuance of a permit is discretionary. Indeed, after the Repeal Act's passage, the Commissioner of Conservation issued a stop order to WICO on the ground that the permit previously issued was no longer valid (Joint App. 205a-206a).

Far from advancing a broad public purpose, the Repeal Act was aimed solely at WICO.¹⁸ Even assuming *arguendo* that the Repeal Act rose to the level of asserting a significant and legitimate public purpose, that in and of itself is not enough to justify the impairment of contractual relations:

A court must also satisfy itself that the legislature's adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserve Group v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) (quoting *United States Trust Co. v. New Jersey* 431 U.S. 1, 22 (1977)). But, we have repeatedly held that unless the State is itself a contracting party, courts should, "properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Group*, 459 U.S. at 413, (quoting *United States Trust Co.*, 431 U.S. at 23).

Keystone Bituminous Coal Assoc. v. De Benedictis, 480 U.S. ___, 107 S.Ct. 1232, 55 U.S.L.W. 4326, 4336 (1987).

In the instant case, the Court may not defer to the Legislature's judgment, as the Government itself is a contracting party.

It is significant that the courts below were not deceived as to the purpose and intended effect of the Repeal Act. The Attorney General of the Virgin Islands refused to defend the Repeal Act in court because, as the District Court noted, the executive

18 The Repeal Act was retroactive in nature, and enacted without warning after WICO, in reliance on Act No. 4700, entered into a \$1,700,000 reclaiming contract and commenced dredging.

branch "considered the repeal of WICO's rights to be invalid" (Joint App. 59a). After careful analysis the District Court concluded that the Repeal Act was a comprehensive elimination of WICO's rights: "the seal of the Legislature is put on a repudiation of WICO's original grant from the Government of Denmark, and the recognition of that grant by the Government of the United States" (Joint App. 76a). Likewise, the Court of Appeals concluded that "... WICO's contract rights are gravely impaired, *to the point of virtual annihilation*, by the Repeal Act." (Joint App. 37a, emphasis supplied).

Finally, contrary to the Citizen Intervenors' assertion that the Second Addendum constituted an attempt by a prior Legislature to contract away future police powers, the record plainly shows that the Second Addendum was a carefully drafted settlement agreement which recognizes and preserves the Government's police power. The Second Addendum was negotiated and signed after extensive consideration of all environmental and police power concerns now raised by the Legislature in its Jurisdictional Statement; the most compelling evidence that the CZMA's objectives were incorporated into the Second Addendum was the extensive participation in the negotiations by Professor Heyman, drafter of the CZMA, who outlined the contents of what would become the Second Addendum in his Memorandum to the Government of the Virgin Islands dated January 19, 1980 (WICO App. 8a-10a).

The Virgin Islands Government surrendered no essential attribute of its sovereignty in the Second Addendum. In fact, the Virgin Islands *gained* sovereignty over an additional 16 acres of submerged lands, over which it did not have clear title *prior* to the Second Addendum. In addition, the Second Addendum restricts the use of WICO's remaining acres, a direct acknowledgment of the Government's police power over lands which arguably were not subject to such police power by virtue of the Treaty rights granted WICO. The Court of Appeals expressly noted that it was not holding that the police powers of the Virgin Islands were exhausted with respect to WICO's 15 acres when the Second Addendum was approved (Joint App. 39a). "WICO is obviously not immune from generally applica-

ble police power measures not inconsistent with the Second Addendum" (*id.*). The critical point, however, is that the Repeal Act—which was nothing less than an attempt to repudiate WICO's rights—was not a proper exercise of the police power of the Virgin Islands.

III. Citizen Intervenors' Arguments That the Second Addendum Is Invalid Because It Improperly Promised To Convey Trustlands, Improperly Modified an International Treaty, and Improperly Promised to Convey Property Rights In Violation of the Common Law Rule Against Perpetuities, Do Not Present Substantial Federal Questions for Review by This Court.

The Citizen Intervenors are seeking further review of their repeatedly rejected argument that the Virgin Islands Government's agreement to convey title to submerged lands to WICO in the Second Addendum was invalid under the Public Trust Doctrine (Citizen Intervenors' Jurisdictional Statement, pp. 10-12). The Court of Appeals correctly recounted that the 1974 Act conveyed title to submerged lands in trust to the Virgin Islands Government "subject to existing rights" (Joint App. 28a). Among those "existing rights" were those of WICO which had been recently recognized in the 1973 Memorandum. After carefully reviewing the authorities, the Court of Appeals concluded that submerged lands may be conveyed in order to satisfy international obligations¹⁹ or to further the public interest in the submerged lands²⁰ (Joint App. 29a-35a). In view of the circumstances of the case, the Court of Appeals found that approval of the Second Addendum in 1982 "was clearly consistent with the fiduciary obligations of the legislature" and therefore the public trust doctrine did not bar formation of a valid contract between WICO and the Government of the Virgin Islands (Joint App. 35a).

19 *Shively v. Bowlby*, 152 U.S. 1, 47-48 (1894); *Montana v. United States*, 450 U.S. 544, 551-52 (1981), *reh'g denied*, 452 U.S. 911 (1981).

20 See Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich. L. Rev. 471 (1970).

Close scrutiny of the implications of the result sought by the Citizen Intervenors in this case can leave no doubt that the Court of Appeals reached the correct conclusion. Sustaining the Repeal Act hardly promotes the public interest in submerged lands in St. Thomas Harbor. If the Second Addendum is declared invalid or is effectively repealed, WICO will not have 15 acres of reclaimed land which it can develop only in accordance with the exacting requirements of the Second Addendum. Instead, WICO will have a powerful claim to dredge, reclaim, and develop 42 acres in St. Thomas Harbor.²¹ The District Court recognized that "[t]o adopt the intervenors' arguments in favor of . . . upholding the repeal of WICO's rights, would invite chaos" (Joint App. 82a). Given these circumstances, it is clear that the action of the Sixteenth Legislature in passing the Repeal Act in response to public pressure—not the action of the Fourteenth Legislature in ratifying the Second Addendum after careful deliberation—was "the imprudent action of a government of the day."²²

The Citizen Intervenors are plainly grasping at straws when they argue that the Second Addendum is invalid because it improperly modified an international treaty. The Treaty accorded WICO a right to have the United States Government respect its original grant of rights from Denmark "in accordance with the terms on which they are given" (Joint App. 101a). WICO now has negotiated agreements limiting and reducing those rights with the United States Government and its successor in interest, the Virgin Islands Government. Citizen Intervenors

21 The 1968 lawsuit brought by the United States to quiet title in St. Thomas Harbor was dismissed in 1984. Because the order of dismissal under Fed.R.Civ.P. 41(b) did not specify otherwise, the dismissal "operates as an adjudication upon the merits." See *Costello v. United States*, 365 U.S. 265, 285-88 (1961). WICO may invoke the finality of the order of dismissal for the purpose of precluding the Virgin Islands Government, as successor-in-interest to the United States, from relitigating the merits of the quiet title action. See *Restatement (Second) of Judgments*, Section 43 (1982) (a judgment that determines interests in property "has preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself.').

22 See Citizen Intervenors' Jurisdictional Statement, p. 10.

nors' position that WICO cannot, in effect, relinquish certain rights to the Virgin Islands Government, or negotiate *to WICO's own detriment* limitations and restrictions as to the extent and exercise of those rights, is not a substantial federal question requiring further review by this Court. This argument, bordering on the frivolous, was rejected with appropriate dispatch by the Court of Appeals (Joint App. 23a-24a, n.14).

Similarly, Citizen Intervenors' contention that the Second Addendum violates the common law rule against perpetuities does not present a substantial federal question warranting review by this Court. The mere averment of a constitutional question is insufficient to afford a basis for appeal where the question presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason. *See Farrell v. O'Brien*, 199 U.S. 89, 100 (1905). As the District Court correctly noted in addressing Citizen Intervenors' rule against perpetuities argument,

Title 1, Section 4 of the Virgin Islands Code states:

"The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, *in the absence of local laws to the contrary.*" (emphasis added)

In this instance the Memorandum of Understanding, dated October 9, 1973, was executed by the government of the Virgin Islands only after its terms had been previously approved by the Ninth Legislature of the Virgin Islands on October 30, 1972 (Act No. 3326). Likewise, a Second Addenda to the Memorandum of Understanding, dated September 22, 1981, was ratified and approved by the Fourteenth Legislature on April 7, 1982 (Act No. 4700). By its terms the second addenda has "the full force and effect of law."

It is clear, then, that even if applicable, the Rule Against Perpetuities was modified by adoption of local laws to the contrary.

(Joint App. 46a).

The Court of Appeals considered the rule against perpetuities argument irrelevant because it viewed "the Second Addendum as definitely establishing contractual rights in WICO" (Joint App. 28a, n.17).

In light of the lower courts' manifestly correct disposition of Citizen Intervenors' rule against perpetuities argument, no substantial federal question warranting further review is presented to this Court. Appellants have had opportunities to present their rule against perpetuities argument both to the District Court and to the Court of Appeals, the issues have been fully briefed and argued, and further review would not be a productive use of the Court's time.

CONCLUSION

For the foregoing reasons, the appeals of the Citizen Intervenor and the Legislature should be dismissed, or in the alternative, the decision of the United States Court of Appeals for the Third Circuit entered March 31, 1988 should be affirmed.

Respectfully submitted,

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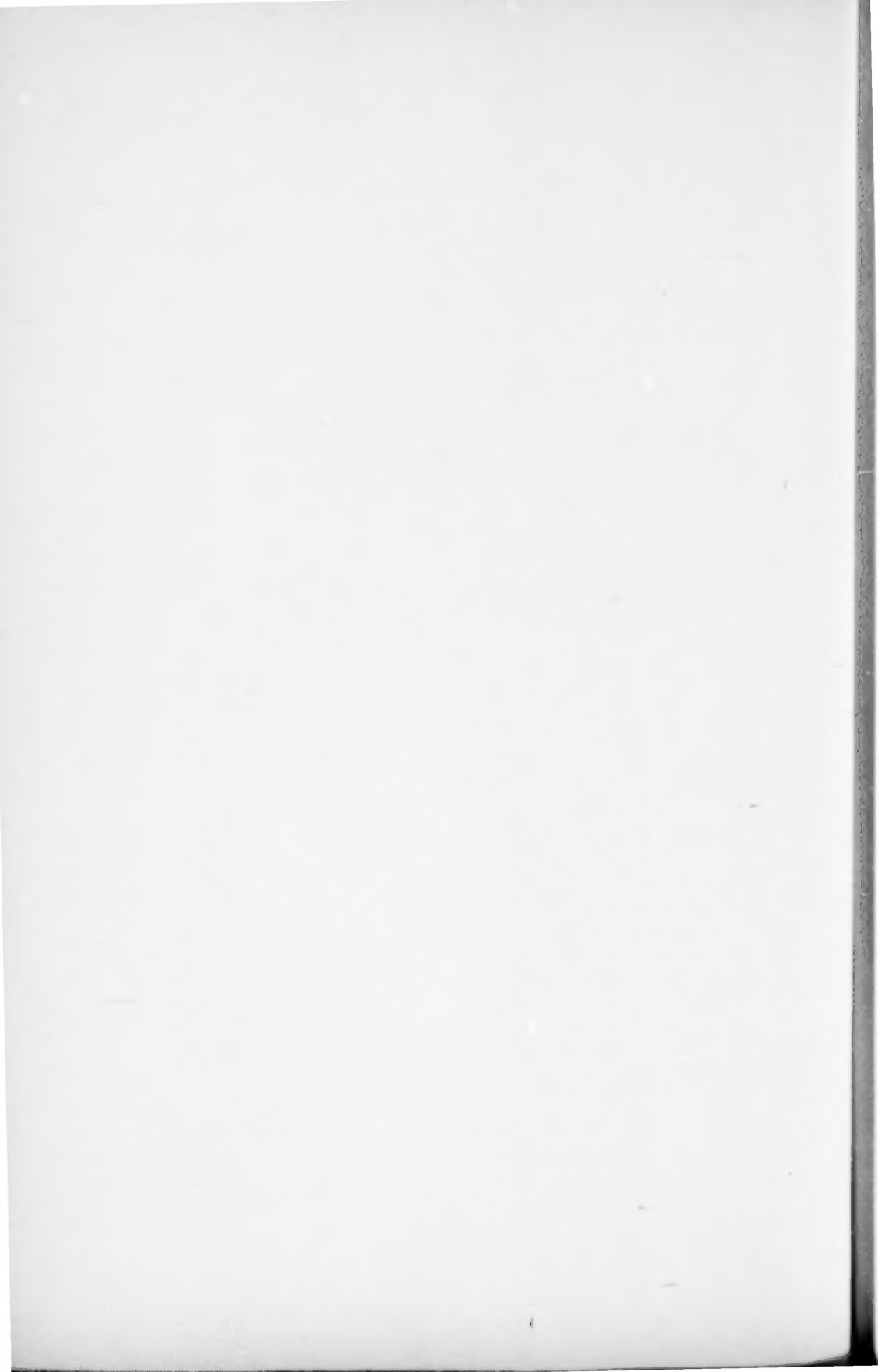
St. Thomas,

U.S. Virgin Islands 00802

(809) 774-1680

July 29, 1988

APPENDIX



[SEAL]

THE VIRGIN ISLANDS OF THE UNITED STATES

OFFICE OF THE GOVERNOR

CHARLOTTE AMALIE, ST. THOMAS, V. I. 00801

July 21, 1986

Honorable Derek M. Hodge
President
Sixteenth Legislature of the
Virgin Islands
Senate Building
St. Thomas, Virgin Islands 00801

Dear Mr. President:

I return without executive approval Bill No. 16-0607 "To repeal Act Nos. 3326 and 4700 pertaining to the West Indian Company, Ltd. and for other purposes".

This bill would dishonor Virgin Islands Government commitments to the West Indian Company, Ltd. (WICO) that have been entered into, after long and careful deliberation, on several previous occasions.

There is no acceptable reason for this ill-advised action on the part of the Sixteenth Legislature. Notwithstanding the apparent perception of the nine members of the Legislature who voted to repeal the WICO agreements that they were responding to substantial public opinion on the dredging issue, their action is in reality a sad betrayal of the public trust.

In the instant case the better judgment of two-thirds of the members of the Legislature has been sacrificed to the opinions of a few vocal and misguided individuals who have successfully capitalized on the re-election fears of these "community followers".

Surely this measure would not have passed had a previous Legislature not incurred the wrath of the voters by rezoning Estate Zufriedenheit. Yet how does one compare the environmental threat to Magen's Bay with a long-standing agreement

to permit the limited further development of an already heavily developed harborfront at Long Bay?

The Legislature has fallen victim to a collective mentality that is willing to undo for political expediency that which has been carefully and deliberately negotiated and made a law of this land. In 1972 a well informed Ninth Legislature decided upon a compromise solution to the very legitimate concern that some 42 acres of Long Bay not be dredged and filled for commercial purposes, by agreeing to permit the development of only 7.5 acres of the total claimed by WICO. The Ninth Legislature had been told that the development rights claimed by WICO by virtue of Article 3 of the 1917 Cession Treaty between Denmark and the United States were almost certainly legitimate and not worth the uncertainties of prolonged and expensive litigation to contest.

To put the current situation in proper perspective we must consider what Long Bay could now look like had the Governor and Legislature in 1972 decided, against the strong advice of the person then best informed on both sides of the issue (Judge Warren Young), to litigate and had then proceeded to lose that litigation. The litigation risks that were not worth taking in 1972 are even less worth taking now. Enactment of Bill No. 16-0607 would, in addition to exposing the Government and people to the possibility of full assertion of treaty rights by WICO regarding Long Bay, also likely result in claims by WICO that the Government has unconstitutionally impaired a lawful contract and deprived WICO of property without just compensation. The price tag for this venture, in event of success by WICO, would likely be several million dollars.

Let us weigh the unquestionable long term financial benefits to the local Treasury and the creation of jobs that a well planned and executed, multi-million dollar project of the kind WICO has in mind against the dubious, at best, benefits that may be realized by even a successful trip down the dangerous path now being trod by the Legislature.

Additionally, how can this Government be expected to raise desperately needed revenues without increasing taxes or reducing payroll as a last resort, if its economic development program is slowly being destroyed by some non-courageous

legislators who easily bend constantly to political public opinion pressure?

I believe common sense and reason require that this dangerous path be abandoned in favor of other election year pursuits that have less potential for economic and social disaster in our fragile community.

Sincerely yours,

/s/ JUAN LUIS
Juan Luis
Governor

DANISH EMBASSY
WASHINGTON, D.C.

The Embassy of Denmark presents its compliments to the Department of State and has the honor to convey to the Department the following statement received from the Danish Ministry for Foreign Affairs:

In the Treaty of Cession of August 4, 1916, by which Denmark ceded the islands St. Thomas, St. John and St. Croix to the United States, the United States undertook, under Article 3 (4), to "maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given: (A) The Concession granted to "Det vestindiske Kompagni" (The West Indian Company), Ltd. by the communications from the Ministry of Finance of January 18, 1913, and of April 16, 1913, relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor and preferential rights as to commercial, industrial or shipping establishments in the said harbor."

The substance of the concession granted to The West Indian Company Ltd. by the aforesaid letter of January 18, 1913, must be assessed on the basis of Danish law because the Virgin Islands were still Danish at that time. As the concession was unlimited in time, the U.S. State Department inquired, through the U.S. Embassy in Copenhagen, in August 1916, as to the period for which the West Indian Company was entitled to hold the concession. In reply, the Ministry of Foreign Affairs informed the U.S. Minister in Copenhagen on August 16, 1917, that the Company had been granted free and unlimited possession of the area, no right of pre-emption being reserved to the Government.

Under the rules of Danish law, the State holds the full ownership of Denmark's territorial waters. Hence, the Government has the right not only to sell part of the territorial waters, e.g. for damming, but also to sell part of water area for a specific use. It was, therefore, in full conformity with Danish practice that a concession was granted to the West Indian Company in 1913 in respect of the water area near Long Bay, St. Thomas, leaving the Company free to decide whether the area would be

filled in or utilized in any other way and when such filling in would be undertaken, apart from those areas which had been embanked by the Company immediately after the granting of the concession.

Danish Government authorities have generally stipulated time limits for concessions granted in respect of harbour installations and similar installations, but no such stipulation is prescribed by law, and it is not a unique case in Danish practice for a concession conferring ownership for an unlimited period to be granted like that which the West Indian Company obtained.

It may further be noted that the Danish Parliament in 1912 authorized the Government to grant a consortium the exclusive right, for a period of 99 years, to construct harbour installations in Long Bay, St. Thomas. This concession did not enter into force, but it serves to illustrate the then existing general Danish practice of granting concessions to private bodies for periods of 80-100 years.

The Danish Government feels confident that the United States will respect all the obligations following from the above mentioned Treaty of August 4, 1916.

Washington, D.C., June 25, 1970

[SEAL]

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

Civil No. 337-1968

UNITED STATES OF AMERICA,

Plaintiff

—vs—

WEST INDIAN COMPANY, LTD.,

Defendant

ORDER

A Memorandum of Understanding, dated October 3, 1973, and signed by all the parties to the above litigation, has been brought to the Court's attention.

WHEREAS, the above Memorandum obligates the West Indian Company, Ltd. to make certain landfills in St. Thomas harbor, which landfills may require a year and a half or more; and

WHEREAS, disagreements may arise as to the satisfactory performance of the above conditions, or of other conditions included in the Memorandum,

It is hereby ORDERED:

1. That the cause be continued *sine die* until in the Court's judgment the affirmative obligations of the parties under the Agreement are performed; and
2. That all parties report to the Court at 90 day intervals as to the progress of the performance of conditions, the first report to be submitted March 1, 1974.

7a

Dated at Christiansted, St. Croix,
this 27th day of December, 1973.

ENTER:

/s/ WARREN H. YOUNG
Warren H. Young
Judge

January 19, 1980

MEMORANDUM

TO: Commissioner Darlan Brin
FROM: I. M. Heyman
SUBJECT: A Suggested Means for Proceeding Towards
Settlement of the WICO Claim

For the reasons stated in the Preliminary Report of January 7, 1980 analyzing legal issues presented by WICO, I believe that it would be in the interest of the Government of the Virgin Islands to settle the outstanding dispute. My sense is that those in the Executive Branch, who know the history of the dispute, view WICO's latest offer as generally reasonable. It demands vastly less submerged land than arguably was due WICO under the Treaty and considerably less than confirmed to WICO under the Memorandum of Agreement, which I believe is enforceable against V.I.

There are three problems, however, that have to be addressed if a satisfactory settlement is to be effectuated:

(1) Settlement requires amendments to the CZMA. This, in turn, requires a recommendation by the Coastal Zone Management Commission and action by the Legislature. This means that the Executive Branch must convince these bodies and the public that the proposed settlement is sensible. This is going to take considerable education of people unfamiliar with the background.

(2) WICO, in its proffered Addendum, offers some restrictions on uses on reclaimed land, but so far has not indicated with any precision how these might be arranged or how development would be sited or designed on the reclaimed areas. Greater precision is required at this time: (a) to draft use and development limitations in the Memorandum and (b) to inform the Commission, the Legislature, and the Public of what is being approved by the settlement.

(3) WICO wishes to avoid the need for obtaining a coastal zone permit before going ahead with development on reclaimed lands. This is probably unwise; rather, it would seem sensible from the V.I.'s viewpoint to require a final permit to allow "fine tuning" with respect to siting, design, access roads, landscaping, and the like.

To address the foregoing, I propose:

A) That Commissioner Brin should be authorize to negotiate with WICO the Second Addendum to the Memorandum. His lawyer should be the A.G. and what is agreed to should reflect the positions of the Commissioner, the A. G. and the Governor's Office.

B) The Second Addendum should provide that it becomes effective upon the passage of the necessary amendment to the CZMA; or in the alternative, it should provide that the Governor will use his best efforts to have the necessary amendment adopted, but that such adoption within a stated time limit, is a condition precedent to the V. I.'s obligation to perform.

C) When there is a consensus between the Executive Branch (the Governor's Office, the A.G., and the Commissioner) and WICO on the provisions of the Second Addendum, the necessary amendment to CZMA should be proposed by the Governor and sent for a hearing before and recommendations by, the Coastal Zone Management Commission. At such a hearing, Commissioner Brin should review in detail the history of the WICO dispute, emphasizing the extent to which the efforts of the V.I. Government have reduced the extent of the areas to be reclaimed as well as the extensive areas vulnerable to reclamation (or the potential money damages) should the agreement not be realized and should WICO prevail in a litigation.

D) After recommendatory action by the CZM Commission, the Bill amending the CZMA should go to the Legislature for action. One problem that should be foreseen is that some people might urge exercise of eminent domain powers to acquire whatever are WICO's rights. The A.G. will have to be in a position to estimate the probable cost to the V.I. of such an alterna-

tive. This will be a difficult estimate given the legal uncertainties, especially involving exercise of the police power, explored in the Preliminary Report of January 7, 1980.

COASTAL ZONE PERMIT NO. CZT-89-83W

1. *AUTHORITY.* This permit is issued by the Coastal Zone Management Commission (hereinafter "The Commission") on behalf of the Department of Conservation and Cultural Affairs of the Government of the Virgin Islands pursuant to Title 12, Chapter 21, Virgin Islands Code and Act 4700. As herein, "Permitter" is the Government of the Virgin Islands and "Permittee" is The West Indian Company, Ltd. (WICO).

2. *SCOPE.* To dredge approximately 134,000 cubic yards from an area approximately 26 acres in size in Outer Long Bay. The spoils will be dewatered on fastland and then used as fill material to fill approximately 7.5 acres of submerged lands seaward of Long Bay. The filled area will be protected on the seaward side by rock and gravel armour. The area to be dredged and filled are the areas agreed to in the Second Addendum to Memorandum of Understanding dated as of the 3rd Day of October, 1973. The area to be filled is seaward of Parcels No. 4, 5 & 5A Estate Thomas, St. Thomas, V.I.

3. *TERM.* This permit is effective upon its approval by the St. Thomas Committee of the Coastal Zone Management Commission. The Governor and the Legislature of the Virgin Islands have approved and ratified the activities authorized by the permit in Act 4700, duly adopted by the Fourteenth Legislature and signed into law by the Governor, as confirmed by the annexed Memorandum Opinion of the Attorney General dated June 22, 1984. Authorization for construction under this permit shall expire if the permittee fails to conform to the time limits in the Second Addendum to the Memorandum of Understanding dated as of the 3rd day of October, 1973 among the Government of the Virgin Islands, the West Indian Company, Ltd., and others (hereinafter "Second Addendum to Memorandum of Understanding").

4. *DOCUMENTS INCORPORATED BY REFERENCE.*

- EXHIBIT A. Application Form
 B. Application Letter
 C. Project Drawings

- D. Environmental Assessment Report
- E. Second Addendum to Memorandum of Understanding dated as of the 3rd day of October, 1973.

5. *GENERAL CONDITIONS.*

- (a) *Liability.* The Permittee agrees to assume full and complete responsibility for all liability to any person or persons, including employees, as a result of its control of the area described in Paragraph 2 of this permit and all improvements thereon (which area and improvements are hereinafter referred to as "the premises"), and to hold the Permitter free and harmless from civil or other liability of any kind during the time the Permittee is in control of the premises pursuant to this permit.
- (b) *Personal Property and Damage.* All personal property of any kind or description whatsoever located on the premises shall be there at the Permittee's sole risk.
- (c) *Assignment or Transfer.* This permit may not be transferred or assigned except as provided in Section 910-15 of the Regulations of the Coastal Zone Management Act, or as provided in the Second Addendum to Memorandum of Understanding.
- (d) *Permit to be Displayed.* A placard evidencing the permit shall be posted in a conspicuous place at the project site during the entire period of work.
- (e) *Reliance on Information and Data.* The Permittee affirms that the information and data which it provided in connection with its permit application is true and accurate, and acknowledges that, if subsequent to the effective date of this permit such information and data proves to be false or inaccurate, the permit may be modified, suspended or revoked in whole or in part, and that the Commissioner may, in addition, institute appropriate legal action.

- (f) *Development to be Commenced.* Any and all developments approved by this Coastal Zone Permit shall be commenced and completed in accordance with the Second Addendum to Memorandum of Understanding.
- (g) *Notification of Completion.* Upon completion of any activity authorized or required by this Coastal Zone Permit, the Permittee shall promptly so notify the Director of the Division of Coastal Zone Management ("The Director") and, where the services of a professional engineer were required in undertaking the activity, a certification of compliance provided by the project engineer that the plans and specifications of the project and all applicable Virgin Islands Code requirements have been met, shall be filed with the Director.
- (h) *Inspection.* The Commission, its Committee, the Commissioner or their authorized agents or representatives shall have the power to enter at reasonable times upon any lands or waters in the coastal zone for which this Coastal Zone Permit has been issued. The Permittee shall permit such entry for the purpose of inspecting and ascertaining compliance with the terms and conditions of said Coastal Zone Permit. The Permittee shall provide access to such records as the Commission, its Committee, or the Commissioner in the performance of its or his duties under the Act may require the Permittee to maintain. Such records may be examined and copies shall be submitted to the Commission, its Committee or the Commissioner upon request.
- (i) *Conditions of Premises.* The development authorized by this permit shall be maintained in a safe, attractive and satisfactory condition and in accordance with the description, plans or drawings approved by the Commissioner, pursuant to the Second Addendum to Memorandum of Understanding.

- (j) *Public Access to Shoreline.* The development shall be operated so as to assure optimum public access to the shoreline.
- (k) *Notices.* All notices sent or required to be sent hereunder must be by certified mail, return receipt requested. If addressed to the Permitter, same shall be sent to the Commissioner of Conservation and Cultural Affairs, Government of the Virgin Islands, Post Office Box 4340, St. Thomas, U.S. Virgin Islands 00801, or to such other place as the Permitter may hereinafter designate by certified mail. If addressed to the Permittee, same shall be sent to Mr. Hans Jahn, President, The West Indian Company, Ltd., Box 7760, Charlotte Amalie, St. Thomas, U.S. Virgin Islands 00801, or to such other place as the Permittee may hereinafter designate by certified receipt requested.
- (l) *Nonwaiver.* One or more waivers by the Permitter of any covenant or condition of this Permit shall not be construed as a waiver of a further breach of the covenant or condition, and the consent or approval of the Permitter to or of any acts by the Permittee requiring the Permitter's consent or approval shall not be construed as approval of any subsequent similar act by the Permittee.
- (m) *Revocation.* It is specifically understood that all the foregoing covenants and agreements, as well as other terms and special conditions hereby agreed to by Permittee, are to be well and faithfully kept by Permittee and that any material failure by Permittee to keep same, will result in revocation of this permit provided, however, that Permittee shall first have been given notice of any such breach and shall have been afforded a reasonable opportunity to cure.
- (n) *Other Approval.* If the development covered under this permit requires separate and distinct approval from the United States Government or any agency,

department, commission or bureau thereof, then no development is allowed under this permit until such permits or approvals have been obtained.

6. *SPECIAL CONDITIONS.*

1. The West Indian Company, prior to undertaking the development, shall submit to the Division of Coastal Zone Management a detailed drainage plan along with detailed information establishing the sufficiency of the plan to accommodate a 100 year storm.
2. That the West Indian Company undertake the filling of the submerged lands from the eastern most section and proceed seaward, hence westward, forming an embayment. The seaward dike shall be at least 70 feet wide and be maintained at least 100 feet in front of the filling in the embayment, subject to any deviations or adjustments necessary to accommodate the right of election of Yacht Haven Hotel to limit or decline fill in areas allocated to it by the Second Addendum to Memorandum of Understanding.
3. Once the seaward dike is established, armour shall be installed promptly.
4. The Permittee shall install and maintain turbidity curtains seaward of the filling operations.

IN TESTIMONY WHEREOF, the parties herein have hereunto set their hands and seals on the days and years appearing herein below.

GOVERNMENT OF THE VIRGIN ISLANDS

Permittor

/s/ [illegible] Acting Chairman _____

12/18/84

St. Thomas Committee of the
Coastal Zone Management Commission
By: Commission Member

THE WEST INDIAN COMPANY, LTD.

Permittee

[SEAL]

/s/ HANS F. JAHN11/19-84

Permittee

Hans F. Jahn, President

Date

I, LOUIS GRE AUX, do hereby certify that I am the Secretary of the THE WEST INDIAN COMPANY LIMITED, a corporation that Hans F. Jahn, who signed this permit is President of said corporation that he was authorized by its Board of Directors to execute this permit in the name of and in behalf of said corporation. I further certify that the making of this permit is within the scope of the corporation's powers.

/s/ LOUIS GRE AUX

Secretary

Louis Gre aux

SWORN TO AND SUBSCRIBED
before me this 19th day
of November, 1984.

/s/ JUDITH A. KNAPE

Notary Public

THE WEST INDIAN COMPANY, LTD.

Permittee

[SEAL]

	<u>/s/ HANS F. JAHN</u>	<u>11/19-84</u>
Permittee	Hans F. Jahn, President	Date

I, LOUIS GRE AUX, do hereby certify that I am the Secretary of the THE WEST INDIAN COMPANY LIMITED, a corporation that Hans F. Jahn, who signed this permit is President of said corporation that he was authorized by its Board of Directors to execute this permit in the name of and in behalf of said corporation. I further certify that the making of this permit is within the scope of the corporation's powers.

/s/ LOUIS GRE AUX
 Secretary
 Louis Gre aux

SWORN TO AND SUBSCRIBED
 before me this 19th day
 of November, 1984.

/s/ JUDITH A. KNAPE
 Notary Public

[SEAL]

GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES



Department of Conservation and Cultural Affairs

P.O. BOX 4340

CHARLOTTE AMALIE, ST. THOMAS, V.I. 00801

February 9, 1984

Maria Takenson Hodge, P.C.
Attorney At Law
Post Office Box 4511
Charlotte Amalie, St. Thomas
U.S. Virgin Islands 00801

Dear Attorney Hodge:

After reviewing your proposed language for Coastal Zone Management Permit No. CZT-89-83W with members of the Coastal Zone Division Staff, we came to the conclusion that most of it is acceptable, but some had to be discarded; and in some instances, we had to replace some language which was deleted by your draft.

More important, however, is that I could not, under the circumstances, find a legal justification for by-passing the signatures of the Governor, the President of the Legislature or the Chairman of the Committee on Conservation and Cultural Affairs when the Legislature is not in session on this major permit.

I realize that the Legislature passed Act No. 4700 (Bill No. 14-0664) and it was signed into law by the Governor, but the permitting process and its requirements which are consistent with Act No. 4700 must be approved by the Legislature and the Governor for all major permits.

19a

We stand ready to cooperate in any way that we can in order to facilitate the process. I remain,

Sincerely yours,

/s/ WILEY J. HUFF

Wiley J. Huff
Counsel, DCCA

[SEAL]

JAMES S. WISBY
Counsel to the Governor

THE VIRGIN ISLANDS OF THE UNITED STATES

OFFICE OF THE GOVERNOR

P.O. BOX 599

CHARLOTTE AMALIE, ST. THOMAS

(809) 774-0001

March 28, 1984

MEMORANDUM

To: Governor of the Virgin Islands
From: Counsel to the Governor
Re: CZM permit application/West Indian Company dredge
and fill project

This memorandum will address the question of whether the West Indian Company, Ltd., (WICO) is required by law to obtain a coastal zone management permit, approved by the Governor and ratified by the Legislature, in order to dredge 134,000 cubic yards of sand from the St. Thomas harbor to fill 7.5 acres of submerged land at the head of Long Bay.

Background

As briefly as possible, the Government (GVI) entered into a Memorandum of Understanding with WICO on October 3, 1973, confirming certain harbor rights reserved to WICO by treaty between the United States and Denmark ratified in 1917. An addendum was adopted to the Memorandum on October 26, 1975. The CZM law was enacted via Act No. 4248, effective October 31, 1978. WICO construed the new Act as violative of the 1973 Memorandum of Understanding, as amended; the GVI disagreed. To settle the matter a Second Addendum, signed by the Governor, was executed on September 22, 1981, and was subsequently incorporated into and made a part of Act

No. 4700, effective April 7, 1982. The Second Addendum contained, among other things, compromises in both WICO's and GVI's positions regarding the extent of harbor alteration rights conferred on WICO by treaty and the extent of control exercisable by GVI over WICO's rights. In order to provide a vehicle by which the GVI could certify to the U.S. Army Corps of Engineers that all local permits had been issued (a requirement of Paragraph 12(c) of the Second Addendum), WICO applied for a coastal zone permit for the contemplated dredge and fill project.

Summary of Law

Section 1 of Act No 4700 amended § 905(i) of the CZM law (Title 12) to state, in pertinent part, that nothing contained in the CZM law could be construed to alter, limit, diminish, impair or interfere with any treaty right, grant or concession which was vested in WICO prior to enactment of the CZM law and recognized by statute as binding on the GVI, subject to any memorandum of understanding pertaining to such right, grant or concession which has been ratified by law.

Section 2 of Act No. 4700 states, in pertinent part, that the Agreement embodying the aforementioned Second Addendum to the Memorandum of Understanding is hereby ratified with the full force and effect of law, and the Governor and all departments and instrumentalities of government are directed, within the scope of their jurisdictions, to execute the terms of that Agreement.

DCCA'S Position

DCCA's position, as explained by its counsel, Wiley Huff, is that, since the project contemplated by WICO includes occupancy or development of filled lands, § 911 of the CZM law requires approval of the permit by the Governor and ratification of the permit by the Legislature, notwithstanding Act No. 4700 and its incorporated addendum agreement.

WICO's Position

WICO's position, as explained by its counsel, Maria T. Hodge, is that the Second Addendum was negotiated, executed and incorporated into law as an exception to and substitute for the CZM law as it pertains to subject matter specifically treated therein. She supports this position by citing the provisions of paragraph 12(b) of the Second Addendum which state:

“(b) *IMPACT OF VIRGIN ISLANDS COASTAL
ZONE MANAGEMENT ACT*”

The Specific provisions of this Agreement shall govern as to WICO's right to reclaim and to acquire title to reclaimed areas and to develop, and as to permitted uses, height restriction, usable open space and parking which shall not be matters of discretion, *but as to any matters not specifically covered by the Agreement, such as utilities, siting, performance standards, design and landscape, WICO shall be subject to the requirement of a Coastal Zone Management permit in accordance with the provisions of the Virgin Islands Coastal Zone Management Act and the goals and policies of the Virgin Islands Coastal Zone Management Act.*” Emphasis supplied.

WICO's counsel also notes that the Second Addendum was necessitated in the first place because of the complete unacceptability (to WICO) of the contents of § 911(d) (2) of the CZM Act, limiting occupancy of developed, filled land to a 20 year, nonrenewable lease period. It is presumably DCCA's position that this 20 year lease provision also applies to WICO, since it is the same § 911 that imposes the requirement of gubernatorial approval and legislative ratification.

My Opinion

The CZM Act obviously did not originally contemplate accommodation of WICO's treaty rights to fill and develop submerged land, even though the GVI-WICO Memorandum of Understanding had been in existence for 5 years prior to its enactment. It was this oversight that led to execution of the Second Addendum and enactment of Act No. 4700.

It has become clear to me, after reading the Second Addendum, Act No. 4700 and the CZM Act, that the Legislature did not intend to place two potentially fatal stumbling blocks in WICO's path when it ratified and made law the Second Addendum; but that is exactly what DCCA would be doing by requiring that a Coastal Zone Permit be approved by the Governor and ratified by the Legislature before the permit could be effective and the project it describes undertaken. The Governor and the Legislature possess powers granted by the CZM Act to deny permits by refusal to approve and ratify, respectively, and to thereby effectively prohibit any undertaking described in the permit application. If DCCA is correct in its position, then the reason for enactment of Act No. 4700 is not altogether clear.

Possible Remedies

A. The remedy I prefer would entail issuance of a CZM permit to WICO for the described dredge and fill project, accompanied by a copy of Act No. 4700, certified as to authenticity by the Lieutenant Governor, as well as a joint statement signed by the Commissioner of Conservation and Cultural Affairs and the Chairman of the CZM Commission to the effect that enactment of Act No. 4700, with the subject Second Addendum incorporated therein, constitutes approval by the Governor and ratification by the Legislature of the project described in the permit. This remedy would provide the vehicle, a CZM permit, through which the Government (represented by DCCA) could exercise the monitoring, supervising and decision-making authority contemplated for it by the Second Addendum, yet eliminate the potential for outright prohibition of the project represented by DCCA's current position.

B. A less satisfactory remedy would entail cancellation by WICO of its CZM permit application and the seeking of a statement from the Government that the Second Addendum does not contemplate that one be obtained. The Second Addendum would then govern the dredge and fill activity but would not provide the opportunity for specificity in expressing GVI requirements that would exist with a CZM permit. Additionally, the CZM permit has already been applied for and the GVI

possesses, in my opinion, the flexibility to process and grant the permit application in context of Act No. 4700.

Respectfully submitted,

/s/ JAMES S. WISBY
James S. Wisby

The Legislature of the Virgin Islands
Charlotte Amalie, St. Thomas
Virgin Islands
00801

P.O. Box 477

Office of the Legislative Counsel

April 13, 1984

Mr. James Wisby
Counsel to the Governor
Office of the Governor
St. Thomas, VI 00801

Dear Attorney Wisby:

This is in response to your request that I review and comment on your March 28, 1984 memorandum to the Governor relating to the "CZM permit application-West Indian Company dredge and fill project".

I opine that the West Indian Co. does not need to go through the normal process of obtaining a CZM permit to dredge the harbor, that is, the procedures entailed in Title 12, Virgin Islands Code.

My reading of the treaty between Denmark and the United States, dated August 4, 1916, states in part:

"Article 3.

It is especially agreed, however, that: . . . (4) the United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:

(a) the concession granted to the West Indian Company, Ltd. by the communications from the Ministry of Finance of January 18, 1913 and of April 16, 1913 relative to a license to embank, drain, deepen and utilize

certain areas in St. Thomas Harbor and preferential rights as to commercial, industrial or shipping establishments in the said Harbor."

It is apparent that dredging of St. Thomas Harbor was a specific concession granted to the West Indian Company through Article 3 of the treaty between Denmark and the United States and must be honored unless abrogated by the United States Government. Additionally, Act No. 4700 (Bill No. 14-0664), approved April 7, 1982, clarified the question pertaining to dredging permits for the West Indian Co. That Act amended Title 12, Section 905, subsection (i), Virgin Islands Code, by adding a new paragraph (5) to read as follows:

"(5) any treaty right, grant or concession which was vested in any party prior to the date of enactment of this Chapter and which in whole or in part has been expressly recognized by statute, court order or lawfully executed agreement binding on the Government of the Virgin Islands, whether such recognition precedes or succeeds the date of enactment of this Chapter, and subject to any agreements or memorandums of understanding pertaining to such right, grant or concession which have been or may hereafter be ratified by law."

Thus, between the treaty which ceded the Virgin Islands from Denmark to the United States and Act No. 4700, WICO could be issued a CZM permit for the dredge and fill activity as requested by them.

In summary, the treaty of August 4, 1916 and Act No. 4700 leave us with little choice to do otherwise.

Sincerely,

/s/ ERIC E. DAWSON

Eric E. Dawson
Chief Legal Counsel

cc: All Senators
Legal Staff

OFFICE OF THE ATTORNEY GENERAL
OF THE UNITED STATES
VIRGIN ISLANDS
[LETTERHEAD]

June 22, 1984

TO: James S. Wisby, Esq.
Counsel to the Governor
Edwin Hatchette, Chairman
Coastal Zone Management
Committee, St. Thomas

SUBJECT: Memorandum of Agreement: Government of the
Virgin Islands and the West Indian Company, Limited

MEMORANDUM OPINION OF THE
ATTORNEY GENERAL

It is the opinion of the Attorney General that Act No. 4700, approved April 7, 1982, fully ratified the terms and conditions of " 'The Second Addendum to Memorandum of Understanding dated as of the 3rd day of October, 1973' dated the 22 day of September 1981".

To the extent that Act 4700 varies the CZM Act (T. 12, Chapter 21), the provisions of Act 4700 supersedes the CZM Act.

It is further the opinion of the Attorney General that Act 4700 fully satisfies the requirement for Legislative and Executive approval of any CZM Permit issued in accordance with the Memorandum of Understanding and addendum thereto and consistent with the provisions of Act 4700.

DATED: June 22, 1984

/s/ J'ADA M. FINCH-SHEEN

J'Ada M. Finch-Sheen
Attorney General

Application No. 84F-2218
 Name of
 Applicant THE WEST INDIAN COMPANY, LTD. (WICO)
 Effective Date FEB. 14, 1985
 Expiration Date
 (If applicable) FEB. 14, 1990

DEPARTMENT OF THE ARMY PERMIT

Referring to written request dated March 9, 1983 for a permit to:

(X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

(X) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344);

() Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 10652; P.L. 92-532);

The West Indian Company, Ltd.
 Post Office Box 7660
 Charlotte Amalie, St. Thomas
 U.S. Virgin Islands 00801

is hereby authorized by the Secretary of the Army:

to place fill over an area of about 7.5 acres, obtained by the dredging of a borrow area of about 26 acres

in the Long Bay portion of the St. Thomas Harbor

at latitude 13°20'20", longitude 64°5'20", Long Bay Road,
 Charlotte Amalie, St. Thomas, U.S. Virgin Islands

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (*on drawings, give file number or other definite identification marks.*)

labeled "84F-2218", in five sheets revised July 20, 1984
subject to the following conditions:

I. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act (33 U.S.C. 1344), the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92-532, 86 Stat. 1062), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, or any pollutant (*including dredged or fill material*), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in

such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

j. That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

k. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before ____ day of _____, 19____, (*three years from the date of issuance of this permit unless otherwise specified*) this permit, if not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition t hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsi-

bility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

u. That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. *Special Conditions: (Here list conditions relating specifically to the proposed structure or work authorized by this permit):*

a. A Department of the Army permit application shall be submitted for review prior to the construction of the proposed marina, subject to the terms and conditions of the Second Addendum dated 22nd day of September, 1981, to Memorandum of Understanding dated the 3rd of October, 1973, among the West Indian Company Limited, the Government of the Virgin Islands and others, as ratified and enacted into law by Virgin Islands Act No. 4700 approved April 7, 1982.

b. Exploratory underwater archeological investigations and a magnetometer study shall be performed and the results coordinated with the Department of Conservation and Cultural

Affairs (DCCA) and with the Virgin Islands Planning Office, Division for Archeology and Historic Preservation, prior to construction.

c. Should significant cultural material be found, the West Indian Company shall permit the DCCA to conduct a salvage recovery operation to rescue such material.

d. The final plans for the proposed development over the filled area shall be submitted to the DCCA for final approval, subject to the terms and conditions of the Second Addendum dated 22nd day of September, 1981, to Memorandum of Understanding dated the 3rd of October, 1973, among the West Indian Company, Limited, the Government of the Virgin Islands and others, as ratified and enacted into law by Virgin Islands Act No. 4700 approved April 7, 1982.

e. The riprap revetment shall be sloped down to an adequate grade to avoid wave reflection.

The following Special Conditions will be applicable when appropriate:

STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES:

a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

e. Structures for Small Boats: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

MAINTENANCE DREDGING:

a. That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for ____ years from the date of issuance of this permit (*ten years unless otherwise indicated*);

b. That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES:

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR 230;

b. That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.

c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution.

DISPOSAL OF DREDGED MATERIAL INTO OCEAN WATERS:

a. That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.

b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

THE WEST INDIAN COMPANY LIMITED

<u>/s/ HANS F. JAHN</u>	<u>February 6, 1985</u>
Hans F. Jahn Permittee President	Date

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

<u>/s/ CHARLES T. MYERS III</u>	<u>Feb. 14, 1985</u>
Charles T. Myers III, Colonel, Corps of Engineers	Date

DISTRICT ENGINEER,
U.S. ARMY CORPS OF ENGINEERS

Transferee hereby agrees to comply with the terms and conditions of this permit.

<u>Transferee</u>	<u>Date</u>
-------------------	-------------

H. Jahns—Direct

[9] Q And, did you incur expenses in retaining those experts to help you prepare those exact statements and the applications?

A Yes, we did.

Q What kind of expense did you incur for that?

A Well, if you take it from April 1982, when we started to go into all these things and up to the end of June, we incurred altogether about \$400,000 in expenses. That includes the environmental experts, the engineers, but also the legal expenses, but also the archaeological survey which we were required to make as per the Army Corps of Engineers.

Q What kind of a survey was that?

A It was a survey of the area which we are now dredging to find out if there were any artifacts, et cetera, which had to be checked before we could start dredging.

Q Was that an underwater survey?

A That was an underwater survey, an electronic survey.

Q And what was the result of that?

A The results was that they didn't find anything. And, that survey in itself cost \$72,000.

Q Did there come a time that you secured all the necessary permits to go ahead with your dredge and fill operation?

* * *

SIXTEENTH LEGISLATURE OF THE VIRGIN ISLANDS
REGULAR SESSION

JULY 9, 1986

PART I

CHARLOTTE AMALIE,
ST. THOMAS, VIRGIN ISLANDS

B E F O R E :

Senator Derek M. Hodge

A P P E A R A N C E S :

Senator John A. Bell
Senator Lorraine L. Berry
Senator Virdin C. Brown
Senator Adelbert M. Bryan
Senator Hector L. Cintron
Senator Clement Magras
Senator Cleone Creque Maynard
Senator James A. O'Bryan, Jr.
Senator Lilliana Belardo de O'Neal
Senator Holland Redfield, II
Senator Ruby M. Rouss
Senator Allan Paul Shatkin
Senator Iver A. Stridiron

Gregory Lewis
Chief Recording Secretary

[45]

* * *

SENATOR HODGE: Senator Bryan.

MR. COLE: Senator Bryan, two minutes. Senator Bell, three minutes—sorry—five minutes.

SENATOR BELL: Thank you.

SENATOR BRYAN: Mr. President, what we have here is not whether some land in Anna's Hope is to be transferred. There's a distinct and separate difference between land out in Mafolie, or Anna's Hope or down main street or King Street or in Strand Street, as opposed to submerged land. We have to get clear on that; submerge land is trust territory; nobody, this government, this legislature, the judge cannot give away trust land. This is the argument that I'm saying; whether Senator Rouss deeded piece of her land with a next half or another person to get a driveway. That's a different situation, that's land in—land that's not submerged land. Now, the contract or the concession between The West Indian Company, if it was obtained without legal authority by the Finance Ministry of Denmark, to grant that concession; the law is clear, nobody, no government, no branch can deed away or give away or sell submerged or trust [46] land. That's the argument. So, if The West Indian Company obtained these lands through misrepresentation or misinformation, as such, we can repeal contracts, we can repeal those things. The important thing is that since 1972 and up to 1982, even though they had had a contract signed by Governor Evans and Governor King in 1975 and 1978; they took until 1982 to rush to the Fourteenth Legislature to ratify that agreement; and it was ratified without the legal right and authority to do so. The legislature was—the First, the Sixth or the Thirteenth, or the Seventeenth or Twentieth, has no legal authority to sell or transfer trust land. That is the argument. So, we are clear on that. I don't want us to relating land in Anna's Hope, or land in Wintberg. I'm saying trust land is trust land; we need to get cleared on that. Again, the argument and the record are here; I don't have the time, because we was afforded only ten minutes. Nonetheless, Mr. President, the best interest of the people of the Virgin Islands; just like we repeal the no fault, we repealed Cane Bay, we repealed the South Shore situation for the doctors in St. Croix. This body repealed many actions that were

taken by previous legislatures. I'm saying, what is so special with West Indian Company? West Indian Company has not done anything to the Virgin Islands other than employ some people; and take their millions of dollars that they made in the Virgin [47] Islands and ship it outside of the Virgin Islands. Mr. Jahn sat right there and told us that the shareholder is a Hildeberg corporation. There's noplac in the Virgin Islands name Hildeberg. Hildeberg is in Germany. I lived there. How could a company in Yugoslavia and Hildeberg establish in New York—

MR. COLE: Time.

SENATOR BRYAN: —and say that they own these lands—these land belong to the people of the Virgin Islands. We are going to take it back, even if we have to go—I am not accepting their excuse there's a contract. There's no contract. I want the land back; it's ours.

* * *
* * *

[60]

SENATOR BROWN: —an offer to the federal government to settle. The federal government said, let's see what the Virgin Islands Government wants to do and, you know, what the people of the Virgin Islands—the people, not the elected representatives, but the people said we don't want anything to do with an agreement that gives away our rights in this harbor to West Indian Company. The people said it, they don't want them to dredge and fill Frederik Point in Long Bay in 1971 and time after that. But what happened, the people who were elected to represent the people of this territory did not follow the wishes of the people of this territory at that time, particularly St. Thomas. When the vote was counted in October, I guess, it was of 1972, only four people voted against the proposed settlement. And it was from then that we saw things tarded to go downhill. Mr. President, this issue is one in which we have no other choice, but to deal with it one way or the other. But we must deal with it. We must, as Senator Redfield say, roll the dice and see what come out. No matter what we do, it's going to end up in [61] court. I have another alternative that I will offer at a later time, but I am voting for the repeal. We have to take the steps to assert the right of the people of this territory. As

Senator Bryan pointed out, the submerge and fill lands were turned over to the government in trust for the benefit and use of the people of this territory and, yet, day after day we see it being given away, or let slip away out of the hands of the government and out of the hands of the people; and that is no difference. Do we let anybody who want to come in and obstruct the navigable waters? No, we don't, we don't allow that; and we are not talking about just simply asserting the right of police power, because it doesn't stop West Indian Company from owning or claiming title; it doesn't contest that. It asserts one authority, and I am going to support that, too. What we are talking about are rights, title and ownership. It is this government that should have the right and title, and if we want to let West Indian Company dredge and fill, we let them do it at our discretion, on our land. And it should be noted that The West Indian Company is not the only party here that's involved, who will be getting land that would be created here; not The West Indian Company and the government along; but there are at least three other parties; Yacht Haven included. I mean, if you look back on what has happened in recent months; I begin to think that, maybe there may have been [62] another deal cooking between Yacht Haven and West Indian Company even before this matter got this far, before they even got a dredge out there or put out any notices for it; because Yacht Haven made sure—I mean, they are urgently pushing to get a renegotiated agreement on their submerged land permit, to be substituted for a coastal zone permit—

MR. COLE: Time.

SENATOR BROWN:—if I might finish the thought? And they got it in the Fifteenth Legislature and, subsequent to that, in this legislature they pushed to get a buoy line established off of their yachts. Mr. President, there's something rotten in Denmark in this agreement and, I think that we need to clarify it up. Thank you.

SENATOR HODGE: Is there any other senator? Senator O'Bryan.

SENATOR O'BRYAN, JR.: Good morning, Mr. President, fellow colleagues.

Mr. President, in the life of any society in any civilization, there's always a time when an issue has found its time. I have said before and I will say again, my concern relative to West Indian Company claim goes back to the basic treaty. I basically, categorically reject the right of any foreign entity to maintain control over the submerged land of this territory for seventy-three years. [63] Let's face it, when the treaty for the sale of the Virgin Islands was consummated, the world was very different then, colonialism was still in its ranking form; United States was headed toward ward, desperately needing the harbor of the Virgin Islands to protect the Panama Canal, and attempting to—provided it was taken over by the German occupation in World War I, to, of course, have claim to St. Thomas harbor, so any deal that was made that served—

SENATOR HODGE: Just a minute, Senator O'Bryan.

SENATOR O'BRYAN, JR.:—however, since that time the world drastically changed, colonialism is now in retreat across the world; even more so—even the United States has relinquish its claim to the Panama Canal. Great Britain relinquishing its claim to Hongkong. And, so, years later, the vestige of what was the Danish rule still is holding on in the harbor of Charlotte Amalie. I reject that view. I think we, as a society—each of us being trustees of the public will—must for a period of time make some major decision as to what we want the future of the Virgin Islands to be. I do not subscribe to the issue of an agreement being an agreement. The agreement we talk about is an agreement that is vestiged with colonialism and its root cause. And I say there's an inherent right of our people—of a free people, to alter and to basically dominate and to change and to mold where—[64]ever our future may lead us. Certainly, I recognize that the issues do not necessarily legally sound, because we do have an agreement, but an agreement based on what in many of the cases why colonialism has gone into retreat. The previous colonial ruler still has some kind of responsibility to its former colleagues. Does Denmark have any claim to the Virgin Islands? When was the last time we received one dime from the Danish government? America, like it or not, cuse it or not, defend it or not; has been the one who has burdened with the burden of responsibility for the Virgin Islands since 1917; and

the Danish has not looked back. And, now, after all, they claim this treaty and they have rights to our harbor; and in the name of the treaty that they themselves were so glad to get out off. No. My conscience says that I have a responsibility to vote for it and in good faith. I think that the submerged land of this territory belong to the people—those of us who in 1986 live here, work here, raise their children here and will die here. And I refuse to believe that this treaty can bind us forever; for nothing lasts forever. And we, as a free people, have the inherent right to guide our own destiny. And if there is a law—I believe like Martin Luther King, that there is a higher law—the law of a free people to determin their destiny. So, my conscience will be clear. I have no reservations about voting “yes” on this bill; [65] I know its ramifications, but, I think, in the long and short of it—

MR. COLE: Time.

SENATOR O'BRYAN, JR.:—we are now on an issue whose time has come. And I have no doubt that I will sleep very good tonight after voting “yes”. Thank you, very much.

SENATOR HODGE: Senator Magras.

SENATOR MAGRAS: Thank you, Mr. President.

Mr. President, we have heard quite extensively the history of this treaty, but there is one other quotation that I would like to have; it's taken from a book entitled 'The Purchase of the Danish West Indies', printed in 1932. In his reply of July 26, 1916, Mr. Muck (phonetics) the noted former secretary; and I quote: “Am most anxious that treaty should be signed at once, without waiting to examine original documents relating to concessions or attempting to modify provisions in regard to special rights of Danish subjects. He thinks that you should meet their representative at once in New York and close the matter, otherwise it may fail”. There is no country, Denmark, the United States nor the Virgin Islands that allow any individual or corporation to own submerged land. So, how in God's name could a piece of [66] legislation like this—that stand before us now, that says that this will, and our rights to submerged land be upheld in any court of competent jurisdiction, including the world court. There's no court that will uphold that. Judge Young in his preliminary evaluation recommended settlement. But, more

importantly, he recommended further study of this subject. That was what Judge Young recommended. Public lands, submerged lands which were to be held in trust by the government that have been ceded to a foreign entity, a foreign corporation; because regardless of the fact that this company was registered here in the Virgin Islands; it's owners are of foreign origin. And I say to my fellow legislators here today, that no one is infallible, not even those former legislators who voted on Act 4700 or any previous piece of legislation relating to this matter. You still have the right to change your mind. You may have been misled. And the lines of collusion in previous administrations have been clearly drawn. We know who the parties were to the negotiations, and there is no doubt that there was collusion involved in the original settlement—

SENATOR ROUSS: Collusion with who?

SENATOR MAGRAS: —we cannot, as legislators, abdicate our legal right to police these islands. We cannot give up our police powers to any corporation. A major [67] concern here is not the development of Long Bay, but, rather, the failure or refusal of WICO to disclose to us what they intend to put on that piece of land that they are creating out there. And I say to you, that I have learned from sources that part of their intention is to bunker fuel on that site. If we have not learned from our experience with the oil spill that we had recently if we had not learned that, that could mean the total destruction of the tourism industry for another oil spill to occur here in this harbor; then I say we have not learned our lesson, and West Indian Company is not telling us what they are going to do at that site. And they are saying that we have no right to tell them what to do on that site. And I'm saying this is wrong; no person and no corporation should be above the law. There are too many unanswered questions about what is going on here in the territory, especially with this particular project. I'm not against development, but planned development. We should have control of what is happening. Change, yes; but controlled change. For years we have heard legislators talked about planned development. We have never had any five or ten year plan put in. Section 909 of the Coastal Zone Act specifically talks about areas of special concern or particular concern. They were never iden-

tified, the report was never submitted to the legislature. The question is whether or not this government is going to take control of the lands under its jurisdiction [68] or whether or not we are going to abdicate that right to a foreign entity? And I say, the time to stop it is now. The time to correct that situation is now. And I intend to vote for repeal of these two bills in which we gave up our rights.

SENATOR HODGE: Senator Stridiron. Senator Berry. Senator Rouss. Senator Shatkin. Anybody waiting to speak last? You wish to give up the right to speak?

SENATOR STRIDIRON: Mr. President.

SENATOR HODGE: Senator Stridiron.

SENATOR STRIDIRON: Mr. President, I rise in opposition to the bill. Senator Magras read from a book written in 1932; but let me read from a book which is the law of the land, that is, the Virgin Islands Code. Let me read specifically from a section of the Virgin Islands Code, something that should be dear to the heart of all legislators, as well as all private citizens in this community. It says: "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty or property, without due process of law or deny to any person their equal protection of the laws". That is the Bill of Rights for the people of the Virgin Islands. Another portion of the Bill of Rights set forth in this book said: "No law impairing the obligations of contracts shall be enacted."

* * *

[73] SENATOR HODGE: Senator Berry.

SENATOR BERRY: Thank you, Mr. President.

Good morning, colleagues. I have listened to all the testimonies here this morning—some apply to the issue at hand, some of them dealt with people's lack of courage or the fact that it's an election in November or September, and we cannot make decisions because we are being controlled by the people that are supposed to elect us to office. And I stand here today, and I say "the lack of courage" come from people in here when they voted to increase the real property taxes, to give raises to union employees, that were never coming. And, today, they are coming in to repeal it. That's where the lack of courage starts. So,

let's talk about courage, let's be specific. People running because union employees said you have to give me an increase; but today you are going to repeal the same monies that you were going to give them the increase last time. Secondly, there are those who say, this is an election year, and why did this issue come up; it was the Fourteenth Legislature that passed the legislation that allowed WICO to do what they are doing today. So, we are saying that. I am saying that this body did not have the authority to give title of submerged lands to a private entity, and since you didn't have that authority, the [74] contract is invalid. So, we have to be concerned, my colleagues, about repealing a valid contract, because if you never had the authority to enter into that contract, you were operating at the moment—based on your conscience, as you refer to it or lack of information, I would refer to it—but lack of authority to enter into a contract; makes the contract invalid. This is why, today we also have on the book the Rogge contract, which has not built one project yet. And that, also is an invalid contract, but, again, the people of the Virgin Islands are going to wait this election and find out how many houses were built, how many schools were built, why your airport is being built and—I'm saying to you, there are colonial mentalities in this legislature; and it is sad, because this is 1986 when we should be seeking more self-government for the control of the Virgin Islands, trying to settle areas in our government where we have to be concerned—when the federal government increases taxes or gives tax cuts and we are here not being controlled of our destiny—this is one of the issues that we should be talking about. But I will tell you one thing; when I vote today to repeal that contract it's based on the fact that I don't want any colonial power trying to control any land in these islands, and it has nothing to do with lack of counsel; it has to do with my feeling of more self-government for the people of the Virgin Islands. [75] And this is an issue I have been discussing from 1983, when I came into this legislature, but there are people here who want to live in the dark ages, and they can go ahead living in those times. But we have to move forward, we have to deal with the issues at hand; and there are people here who feel that these lands should not have been turned over to WICO. Let's make

that decision today. But I also would like to agree with Senator Cintron; we are wasting out time if we don't get ten votes here today. So, we are wasting our time, the people's time, and everyone's time, because we are providing—it's a circus, when you waste time having hearings, and then come in here, vote, because, you know, it's not going to pass or because you don't think it will get ten votes. So, you have done your homework. It is important for each senator to stand up and rise to the occasion, and standup and influence their colleagues who felt that we should not vote on this issue; so we could, at least move this important decision into court, so we can pursue it further. Mr. President, I hope my colleagues—who are on the borderline—will consider the fact that we cannot get a decision in court if we don't repeal the contract or do what Senator Shatkin is saying, rezone the property, hoping that, if that is done, the company would not want to continue filling in the harbor, because there will be no benefits for them through commercial [76] activities. That's a long shot approach. I'm willing to support both approaches. I have no problem, because both would cause the agreement to end up in court. Thank you, Mr. President.

* * *

Regular Session—Part II—July 9, 1986

[43] SENATOR HODGE: Senator Bryan?

SENATOR BRYAN: I think Senator Stridiron is playing a little game with us here. The land that is right there, if you can see it, you can walk through those sands and get in the water. So I'm saying that that land, if you read Act 4700 and the agreement, makes reference to certain concessions to West Indian Company. The repeal of those acts, in fact, would stop West Indian Company and those involved believing that that land was West Indian Company land. It is not West Indian Company land. So I'm saying while it is the people's land, we rezoning it public for the people. That's all we are saying. We are not saying continue to dredge. They have already started the dredging already. Before there wasn't all that sand there before they started to dredge. So they created some land. So I'm saying that that they created recently, plus what was there previously, is now public.

But at the same time we are repealing Acts 4700 and 3326, is in fact saying that the Legislature and the Governor and all involved had no authority to give away the trust lands or the submerged lands.

So we are saying two things. The land belongs to the people, and we are now zoning it public for the people. Am I clear?

* * *

AUG 17 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LEGISLATURE OF THE VIRGIN ISLANDS,
Appellant,

HELEN GJESSING, Individually and as President of Save
Long Bay Coalition, Inc., LEONARD REED, Individually
and as President of Virgin Islands Conservation So-
ciety, Inc., KATE STULL, Individually and as President
of League of Women Voters of V.I., Inc., LUCIEN
MOOLENAAR, Individually and as President of Virgin
Islands 2000, Inc., RUTH MOOLENAAR, Individually and
as Director of St. Thomas Historical Trust, Inc.,
Appellants,
v.

WEST INDIAN COMPANY, LTD.,
Appellee,
v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee.

On Appeal from the United States Court of Appeals
for the Third Circuit

**APPELLANT LEGISLATURE OF THE VIRGIN ISLANDS'
REPLY BRIEF IN OPPOSITION TO MOTION OF
APPELLEE THE WEST INDIAN COMPANY,
LIMITED TO DISMISS OR AFFIRM**

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IN THE
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OCTOBER TERM, 1988

No. 87-2132

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Appellant,

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LIMITED TO DISMISS OR AFFIRM**

Introduction

In responding to the Jurisdictional Statement of the
Legislature of the Virgin Islands (the "Legislature"),

Appellee, West Indian Company, Limited ("WICO") has founded its Motion to Dismiss or Affirm on three fundamental misunderstandings: 1) the effect of the Repeal Act on the Second Addendum; 2) the effect of the Coastal Zone Management Act on WICO's title to the harbor lands in question; and 3) the legislative history of the Repeal Act and the effect of that history on WICO's title.

It is WICO's misunderstanding and misconstruction of these three pivotal factors, and the lower courts' apparent agreement with WICO's perception, that forms the basis of the Legislature's appeal. This Reply Brief will address those issues along with the jurisdictional question raised by WICO in opposition to WICO's Motion to Dismiss or Affirm ("WICO Motion").

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION

WICO errs in stating that this Court has determined that it lacks appellate jurisdiction over a Circuit Court of Appeals' decision invalidating a statute from a territory such as the Virgin Islands. *Fornaris v. Ridge Tool Company*, 400 U.S. 41 (1970) involved a federal court's invalidation under diversity jurisdiction of a statute of the Commonwealth of Puerto Rico. As the Court noted in detail in *Fornaris*, Puerto Rico's Spanish heritage has led to a judicial structure different from other states and territories. 400 U.S. at 42-43. This Court has even devised a unique rule of construction concerning local laws construed by a Puerto Rican court. *Id.* at 43.

Additionally, Puerto Rico has a supreme court from which appeals may be taken pursuant to 28 U.S.C.A. § 1258. The Virgin Islands has no supreme court. Its citizens must rely on the federal district and circuit courts to review legislation, as must the Legislature itself. The only possible avenue for any appellate juris-

diction in this Court from the Virgin Islands is under 28 U.S.C.A. § 1254(2). Puerto Rico is not nearly so limited. A "Puerto Rican statute is not a 'state statute' within § 1254(2)" because it does not need to be. 400 U.S. at 42 n. 1. Legislative acts of the Puerto Rican government can be reviewed by the Puerto Rican Supreme Court whose decisions can, in turn, be reviewed on appeal by this Court. *Fornaris* thus involved an entirely different situation from the instant appeal.

Without any other opportunity for appellate jurisdiction, surely the official acts of the Virgin Islands' Legislature rise to the same level as an ordinance passed by a town council, which is a "state statute" for purposes of § 1254(2) jurisdiction. *City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976). The full legislative authority granted the Virgin Islands by Congress in 48 U.S.C.A. § 1541 *et seq.* demands no less.

II. THE REPEAL ACT DOES NOT REPEAL THE SECOND ADDENDUM

WICO admits the basic proposition of the Legislature's argument when it states at page 8 of its Motion that:

Because the Second Addendum contemplated specific revisions in the CZMA, and indeed could not be implemented without such revisions, the Second Addendum was conditioned on the enactment of appropriate enabling legislation.

Exactly. The Repeal Act did not repeal the Second Addendum, it repealed the "enabling legislation." Specifically, the Repeal Act declared that "Act No. 4700 (Bill No. 14-0664), enacted April 7, 1982, is hereby repealed in its entirety." Joint App. 175a. When the Legislature repealed Act 4700, it was repealing WICO's exemption from the CZMA, not the many other components of the Second Addendum. The other aspects of the Second Ad-

dendum are unaffected by the Repeal Act. This is especially true of the conveyance of title from the United States to WICO, because the Legislature was never a party to the quiet title action which supposedly settled the question of title.

WICO's exemption from the CZMA was the only thing the Legislature could repeal because that was the only aspect of the Second Addendum over which the Legislature had authority. The Legislature was not a party and did not need to be a party to the Second Addendum. The Second Addendum and the rights and responsibilities contained within it stand or fall by themselves. Act 4700 was needed solely to amend the CZMA, which was the responsibility of the Legislature. Joint App. 164a-165a. In 1986 the Legislature wanted WICO to be subject to the CZMA, and that is exactly what the Repeal Act does.

WICO's statements that the "Repeal Act by its terms, repudiates the Second Addendum *in its entirety*" and that "the Repeal Act completely abrogated the Second Addendum" are facially incorrect. WICO App. p. 17; WICO Motion p. 17, n. 15. (emphasis in original.) The Legislature could not have abrogated the Second Addendum even if that had been its express purpose. The Repeal Act repeals Acts 3326 and 4700 and separately requires WICO to comply with the CZMA. It does nothing more. Act 3326 authorized the Government of the Virgin Islands to join in the settlement of the United States' 1960 quiet title action. Act 4700 amended the CZMA to exempt WICO from its coverage and ratified the Second Addendum to that extent—the full and only extent of the Legislature's authority over the Second Addendum.

III. THE CZMA DOES NOT AFFECT WICO'S TITLE

WICO's misunderstanding of the CZMA is apparently based on its fundamental misunderstanding of the Repeal Act. This misunderstanding is made manifest at page 18 of its Motion. WICO claims there that "[b]y

reinstating the amended sections of the CZMA, the Government precluded itself from conveying title." It then goes on to cite sections 911(a)(1) and (d) of the CZMA for the proposition that "trustlands or submerged lands of the Virgin Islands" may only be developed under a nonrenewable lease.

The CZMA has nothing to do with WICO's title. WICO received whatever title it has from the United States. Sections 911(d)(1) and (2) make the obvious distinction between a permit, which is required for the private use of private land, and a lease, which is required for the private use of public land. If WICO has good title to the land for which it seeks a permit, then it only needs to seek a permit under (d)(1), not a lease under (d)(2). Contrary to WICO's claim, a permit is renewable and is not limited by statute to any specific term of years. § 911(d)(1); Joint App. 238a. WICO's citation to sections 911(a)(1) and 911(d) of the CZMA reflects its misunderstanding of that legislative act. The cited provisions apply only to those developers seeking a permit to develop trust land that is owned by the public. These provisions do not apply to developers who own the land on which they plan to develop, and WICO certainly considers itself an owner of the land in question here.

Contrary to WICO's assertion, the Legislature has never argued that "fee simple ownership may be equated with a renewable permit of unspecified duration" WICO Motion, p. 18 n. 16. WICO is confusing the concepts of title with the necessity to obtain an environmental permit to develop land in a coastal zone. Title refers to the underlying ownership of a parcel of land. A permit allows a particular use of land. Any landowner, no matter how secure its title, must obtain a permit or permits to develop in environmentally sensitive coastal lands anywhere in the Virgin Islands, or for that matter in many other states and territories.

It is true, as WICO argues, that the Repeal Act "reduces" it to "the status of a prospective applicant for CZMA permit" [sic]. WICO Motion p. 18. This is exactly what the Legislature had in mind when it passed the Repeal Act. WICO's "reduction" is simply to bring it within the same regulatory constraints as any other coastal developer.

The Repeal Act serves a "broad public purpose" (WICO Motion p. 19) because the CZMA serves such a purpose. When Congress turned over the submerged lands of the Virgin Island to the Virgin Islands, it did so as a matter of public trust "for the benefit of the people" of the Virgin Islands. Joint App. 194a. The CZMA was the Legislature's response to that obligation. It is the sole unified body of regulatory authority to protect the environmental integrity of all coastal lands, both public and private, now governed by the Virgin Islands.

IV. WICO HAS MISCONSTRUED THE REPEAL ACT'S LEGISLATIVE HISTORY AND THE EFFECT OF THAT HISTORY ON ITS TITLE

WICO goes to great lengths to quote snippets of the legislative debate surrounding the enactment of the Repeal Act in an attempt to show that "the principal, if not exclusive, issue was the repudiation of WICO's right to title to submerged lands." WICO Motion p. 10. Despite all the quoted language about colonial powers and trust land, WICO has conveniently neglected to acknowledge that the Repeal Act itself says nothing about title to the land WICO claims and, more importantly, that the result of the same legislative debate that WICO selectively quotes was to reject an amendment contesting WICO's title.

As explained at page 11 of the Legislature's Jurisdictional Statement, an amendment to the Repeal Act that would have designated the land in question as public was debated and put to a vote. That amendment would have

abrogated whatever title WICO received from the United States. Joint App. 181a-184a. WICO quotes directly from the consideration of that amendment in its Motion at the bottom of page 11 in footnote 13. *See also* WICO App. 46a-47a. The Legislature was thus presented with an explicit opportunity to declare that the Virgin Islands, not WICO, holds title to the harbor lands claimed by WICO. When counsel for the Legislature was asked what the affect of such an amendment would be, she replied as follows:

MS. STRUDIVANT: Well, it would mean that the government has taken private property, and converted it into publicly owned property. It seems to me that it would constitute a taking under the constitution. And as such, the government would have to give some sort of compensation for that taking.

Joint App. 184a. Upon that advice the amendment failed by an 8 to 5 vote, with 2 legislators absent. *Id.* If the Legislature had intended to interfere with WICO's title it could have done so through this amendment. It did not, and nothing in the Repeal Act itself is to the contrary.

In that regard, it does not matter what individual legislators say when considering a bill, it is what they do. What they did was to pass a bill requiring WICO to comply with the CZMA and to obtain a permit—not a lease—subject to governmental ratification, and to defeat an amendment to that bill which would have taken WICO's title, such as it was.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction of this appeal.

Respectfully submitted,

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WEST INDIAN COMPANY, LTD.,

v. *Appellee,*

GOVERNMENT OF THE VIRGIN ISLANDS.

Appellee.

**On Appeal from the United States
Court of Appeals for the Third Circuit**

**RESPONSE OF APPELLANTS HELEN GJESSING,
ET AL., TO MOTION TO DISMISS OR AFFIRM**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2132

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,

and *Appellants,*

LEGISLATURE OF THE VIRGIN ISLANDS,
v. *Appellant,*

WEST INDIAN COMPANY, LTD.,
v. *Appellee,*

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee.

**On Appeal from the United States
Court of Appeals for the Third Circuit**

**RESPONSE OF APPELLANTS HELEN GJESSING,
ET AL., TO MOTION TO DISMISS OR AFFIRM**

Pursuant to Supreme Court Rule 16.5 Appellants Helen Gjessing, *et al.*, respond to Appellee, West Indian Company, Ltd.'s ("WICO") Motion to Dismiss or Affirm as follows:

I. INTRODUCTION

Contrary to its intended objective of trivializing the Appellants' arguments as set forth in their respective Jurisdictional Statements, Appellee WICO has unwittingly drawn into sharp focus conflicts in the interpretation and application of existing Supreme Court decisions, as well as disclosing other constitutional conflicts, both procedural and substantive. In combination, these conflicts solicit, in a most compelling and persuasive manner, this Court's review, whether by appeal, as a matter of right, pursuant to 28 U.S.C.A. § 1254(2), or by grant of certiorari, pursuant to 28 U.S.C.A. § 2103. Contrary to WICO's assertion, the substantial issues involved in this action have far-reaching national and territorial impact.

II. THIS COURT MAY ASSERT JURISDICTION OF THIS MATTER BY APPEAL OR BY WRIT OF CERTIORARI

Appellee's assertion that this Court is without jurisdiction of this appeal is incorrect in two respects. From Appellants' research, it would appear that this Court has not rendered a decision on the application of 28 U.S.C.A. § 1254(2) to appeals concerning statutes of the unincorporated territories of the United States. Appellants Gjessing, *et al.*, strongly assert that this Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(2) for the reasons more fully addressed in the Response of Appellant Legislature of the Virgin Islands. Contrary to the assertions of WICO, the status of enactments of the Legislature of the Virgin Islands is distinguishable from that of the free-associated Commonwealth of Puerto Rico and the federally administered District of Columbia and should be treated as within the provisions of 28 U.S.C.A. § 1254(2). Further, unlike these areas, the highest court of last resort for the Virgin Islands is this Court, as no territorial supreme court exists.

Should this Court, however, find that appellate jurisdiction is not proper under 28 U.S.C.A. § 1254(2), it is respectfully requested that the customary practice of converting the jurisdictional statement to a petition for writ of certiorari, timely filed, pursuant to 28 U.S.C.A. § 2103 be applied to preclude dismissal of this action so as to allow Appellants' case to be heard. This request is consistent with the established precedent of this Court. *See: California Coastal Commission v. Granite Rock Company*, — U.S. —, 107 S.Ct. 1419 (1987); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970).

III. SUBSTANTIAL QUESTIONS ARE PRESENTED

WICO misinterprets the basic question presented to this Court in claiming that the Court of Appeals' decision is manifestly correct. The question is whether Act No. 5188 ("the Repeal Act") (App. 175a) constitutes an unconstitutional impairment of WICO's alleged contract rights. That question presents a substantial issue for review by this Court. It is the position of Appellants Gjessing, *et al.*, that an analysis of the legal principles underlying the formation of the Settlement Agreements, from which these rights are derived, is necessary to resolve the question. WICO, on the other hand, seeks a short-cut to this process by having us assume that the agreements are valid and proceed directly to a takings analysis. Should the agreements be invalid, this issue will not be reached.

A. A Substantial Question As To The Proper Application Of The Public Trust Doctrine Does Exist

Conspicuously absent from Appellee's Motion to Dismiss or Affirm is any analysis whatsoever which would disclose that the test enunciated by this Court in *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1893) was ever appropriately applied in authorizing the conveyance of trust lands. Attempting to seek comfort in the assump-

tion that it held valid "existing rights" (Motion, p. 21), Appellee failed to address Appellants' contentions that, in view of WICO's continuing failure to disclose its specific development plans,¹ (1) no finding was or could be made by the Legislature that the proposed development would improve the public's interest in the *jus publicum*; and (2) no finding as to whether the purported extinguishment of the *jus publicum* could be achieved without substantial impairment of the public's interest in the remaining trust lands and waters was ascertainable. Further, throughout this action, identification of and concern for the traditional public uses of the property and the cultural and aesthetic importance of preserving the remaining shoreline of St. Thomas Harbor has been lacking. If the Appellants' contentions cannot be rebutted, the requisite elements of the *Illinois Central* test are not met. Accordingly, any conveyance of trust lands by the Government of the Virgin Islands to WICO was in violation of the Public Trust Doctrine.

B. It Is Imperative That The Unfettered Exercise Of The Police Power Be Protected, Which The Legislature Sought To Do In Act No. 5188

Long Bay is in a vital location in the harbor of St. Thomas. The St. Thomas Harbor has been noted both for its picturesque quality and its marine activity. It has been an important part of the island's way of life and economy from the early Eighteenth Century. It has been a center for trans-shipment of cargo from all parts of the world; it is the most popular cruise ship port in the Caribbean today and for years past; it is an important mooring center for yachts from all over the world; and

¹ In contradistinction to WICO's defense that its development intentions have been disclosed (WICO Motion p. 9, n. 9), it should be noted that paragraph 11(b) of the Second Addendum (App. 165a) lists the *possible* uses to which the filled lands may be put. No where is it stated specifically which use WICO intends to undertake; nor is it possible for WICO to undertake all the permitted uses.

it has provided a readily accessible shoreline for town-folk and fishermen. The continued use of its limited space for these traditional purposes could be disastrously affected by development on Long Bay.

These are some of the reasons why the people of the Virgin Islands, through their legislature and coastal regulations, must control the fate of the harbor; must control development on the bays of the harbor, notably Long Bay; must control mooring and docking in the harbor; and must control dredging and filling in the harbor. The people through their elected representatives have a responsibility to preserve and protect this famous harbor as the economic lifeblood of the island of St. Thomas, and of the Territory of the Virgin Islands.

They must also preserve its beauty and insure against encroachments not compatible with the traditional uses of this special harbor.

WICO's reference to the three-prong test of *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), completely ignores the contention that the first prong of the test was not met. No significant impairment was established because WICO had no justifiable expectation that land acquired through reclamation would be unregulated. Other than applying WICO's interpretation of Act No. 4700 so as to find an exclusive exception, all property in the coastal zone, whether privately or publicly held, is subject to strict regulation. To uphold the regulatory exception granted to WICO by contract would constitute "Special Legislation" prohibited by 48 U.S.C.A. § 1471 in effect at the time Act No. 4700 was enacted. (App. 248a).

The Repeal Act, therefore, sought to nullify a previous unlawful and *ultra vires* act and to restore the unfettered exercise of the police power.

C. Whether The Settlement Agreements Violate A Federal Statutory Prohibition On Modification Of International Treaties By Legislative Enactment Does Pose A Substantial Federal Question

WICO seeks to summarily dismiss, as did the Court of Appeals, Appellants' contention that 48 U.S.C.A. § 1574 (a) (App. 187a) prohibited the Legislature from enacting any law modifying the provisions of a treaty entered into by the United States. Adopting a "result oriented" posture, WICO assumes that it will automatically acquire the right derived from the 1917 Treaty (Motion p. 22) to dredge, reclaim, and develop 42 acres in the Harbor if the Settlement Agreements are declared invalid. Clearly, if the scenario were as WICO paints, WICO would not be so tenaciously and unrelentlessly defending the 1982 Addendum. WICO is fully aware, as was the Court of Appeals (App. 28a-29a), that if the Settlement Agreements are declared invalid, any uncertainty in title to the submerged trust lands at Long Bay created by the "subject to" language of the 1974 Territorial Submerged Lands Act (App. 193a) will be removed. As WICO was given a contingent license to dredge and fill the Harbor (App. 101a), it will only have a highly debatable claim, subject to diplomatic interpretation, to 42 acres of submerged or filled lands, all of which will be subject to the full exercise of the Government's police powers. In view of this contingency, should WICO be determined to have the rights asserted under the Agreements, it would, in fact, be gaining rights which, under the terms of the Treaty, would have lapsed. Thus, the terms of the Treaty would have been modified to WICO's benefit, not its detriment.

D. The Assertion That The Common Law Rule Against Perpetuities Was Modified By Statute Is Contrary To Precedent

Appellee's disregard for established precedent of this Court is plainly represented in its assertion that the application of the common law Rule Against Perpetuities

is without merit. In fact, its reliance on the statements of the District Court and the Court of Appeals highlight the importance of the conflict presented. The holdings of the lower courts that the common law rule was modified merely by the language "with the full force and effect of law" (App. 176a), is plainly contrary to established principles of statutory construction. *Norfolk Redevelopment & Housing Authority v. C. & P. Telephone*, 464 U.S. 30, 36 (1983).

CONCLUSION

Appellants Gjessing, *et al.*, seek to regain the inalienable right and power of the People of the Virgin Islands, acting through their legislators, to fully exercise the police powers conferred on the Government of the Virgin Islands over Appellee, WICO, to the same extent and degree as any developer in the coastal zone. To this end Appellants challenge as erroneous the decision of the Court of Appeals that the Repeal Act constituted a constitutional violation and assert that the lower court's decision raises substantial constitutional issues requiring review by this Court.

Respectfully submitted,

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DATED: August 17, 1988